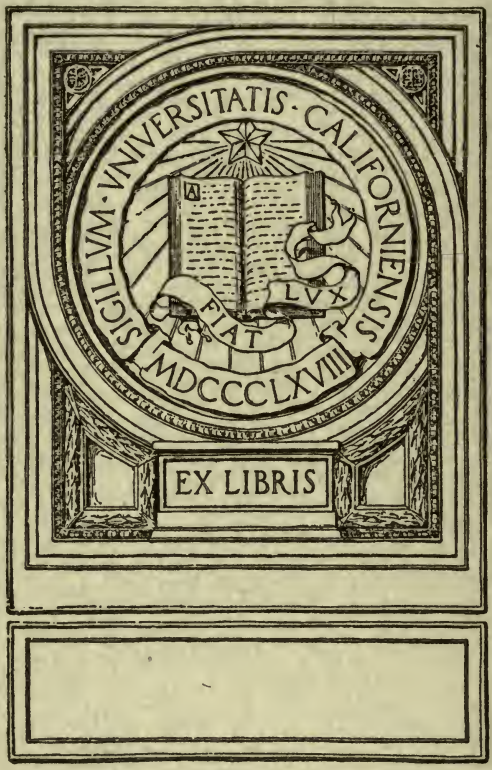
The Standard Fire Policy

DEITCH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THE STANDARD FIRE POLICY

LECTURES BEFORE THE FIRE INSURANCE CLUB OF CHICAGO

BY

GUILFORD A. DEITCH

OF THE

INDIANAPOLIS BAR

THE ROUGH NOTES COMPANY, PUBLISHERS, INDIANAPOLIS, INDIANA

PREFACE

AT THE request of ROUGH NOTES I delivered a series of seven lectures before the Fire Insurance Club, of Chicago, taking as the text the "Standard Fire Insurance Policy of New York." The last lecture was delivered in June, 1905.

So many calls have been received for these lectures that ROUGH NOTES requested me to revise and prepare them for issuance in book form. The result is this volume, which I hope will prove a help to the insurance profession, and an aid to the busy insurance lawyer.

I express my thanks to Mr. Irving Williams, of ROUGH NOTES, and Miss Goldie Scovel, of my office, for assistance in preparing this book for the press.

GUILFORD A. DEITCH.

Indianapolis, June 26, 1905.

The Standard Fire Policy

YOUR committee, to whom was left the choosing of the subjects for the lectures which I have been invited to deliver before you, have requested that I take up the standard policy form and give the construction which the courts have placed upon its provisions.

In the limited number of lectures it will not be possible to cite to you all the cases construing the several provisions of the standard policy. To do so would require more time than the club would care to have taken. If all the cases construing the standard policy form were collected and even briefly noted, they would make a book of more than a thousand pages. I shall endeavor, however, to quote to you from the leading case construing each provision and cite a sufficient number of other cases to inform you of the legal construction.

The standard policy is a form of comparatively recent adoption. It is now provided for in the following States: Connecticut, Maine, Massachusetts, Michigan, North Dakota, Minnesota, New Hampshire, New Jersey, New York, Pennsylvania. Rhode Island, South Dakota and Wisconsin.

Even in those States not having a standard policy law the form is in general use by companies doing more than a local business. There are local mutual fire insurance companies in every State that do not use the standard form.

The reason for the adoption of the standard form of policy can not be better stated than by giving the language of the court in the case of DeLancy v. Rockingham Farmers' Mut. Fire Ins. Co., 52 N. H. 581, 3 Ins. L. J. 131. In that case the court had to construe a law of New Hampshire amending the charter of the defendant company, which had to do with the policy form of the company. The court there used the following language:

"The principal act of precaution was to guard the company against liability for losses. Forms of applications and policies (like those used in this case) of a most complicated and elaborate structure were prepared and filled with covenants, exceptions, stipulations, provisos, rules, regulations and conditions, rendering the policy void in a great number of contingencies. These provisions were of such bulk and character that they would not be understood by men in general, even if subjected to a careful and laborious study; by men in general they were sure not to be studied at all. The study of them was rendered particularly unattractive by a profuse intermixture of discourses on subjects in which a premium payer would have no interest. The compound, if read by him, would, unless he were an extraordinary man, be an inexplicable riddle, a mere flood of darkness and confusion. Some of the most material stipulations were concealed in a mass of rubbish on the back side of the policy and the following page, where few would expect to find anything more than a dull appendix and where scarcely anyone would think of looking for information so important as that the company claimed a special exemption from the operation of the general law of the land relating to the only business in which the company professed to be engaged. As if it were feared that, notwithstanding these discouraging circumstances, some extremely eccentric person might attempt to examine and understand the meaning of the involved and intricate net in which he was to be entangled—it was printed in such small type and in lines so long and so crowded that the perusal of it was made physically difficult, painful and injurious. Seldom has the art of typography been so successfully diverted from the diffusion of knowledge to the suppression of it.

There was ground for the premium payer to argue that the print alone was evidence, competent to be submitted to a jury, of a fraudulent plot. It was not a little remarkable that a method of doing business not designed to impose upon, mislead and deceive him by hiding the truth, and depriving him of all knowledge of what he was concerned to know, should happen to be so admirably adapted to that purpose. As a contrivance for keeping out of sight the dangers created by the agents of the nominal corporation, the system displayed a degree of cultivated ingenuity which, if it had been exercised in any useful calling, would have merited the strongest commendation.

"Traveling agents were necessary to apprise people of their opportunities and induce them to act as policyholders and premium payers, under the name of 'the insured.' Such emissaries were sent out. 'The soliciting agents of insurance companies swarm through the country, plying the inexperienced and unwary, who are ignorant of the principles of insurance law and unlearned in the distinctions that are drawn between legal and equitable estates.' Combs v. Hannibal Savings Ins. Co., 43 Mo. 148, 162; 6 Western Insurance Review, 467, 529. The agents made personal and ardent application to people to accept policies and prevailed upon large numbers to sign papers (represented to be mere matters of form) falsifying an important fact by declaring that they made application for policies, reversing the first material step in the negotiation. An insurance company, by its agent, making assiduous application to an individual to make application to the company for a policy, was a sample of the crookedness characteristic of the whole business.

"When a premium payer met with a loss, and called for the payment promised in the policy which he had accepted upon most zealous solicitations, he was surprised to find that the voluminous, unread and unexplained papers had been so printed at headquarters and so filled out by the agents of the company as to show that he had applied for the policy. This, however, was the least of his surprises. He was informed that he had not only obtained the policy on his own application, but had obtained it by a series of representations (of which he had not the slightest conception) and had solemnly bound himself by a general assortment of covenants and warranties (of which he was unconscious), the number of which was equalled only by their variety and the variety of which was equalled only by their capacity to defeat every claim that could be made upon the company for the performance of its part of the contract. He was further informed that he had succeeded in his application by the falsehood and fraud of his representations—the ommission and misstatement of facts which he had expressly covenanted truthfully to disclose. Knowing well that the applications were made to him and that he had been cajoled by the skillful arts of an importunate agent into the acceptance of the policy and the signing of some paper or other, with as little understanding of their effect as if they had been printed in an unknown and untranslated tongue, he might well be astonished at the inverted application and the strange multitude of fatal representations and ruinous covenants. But when he had time to realize his situation, had heard the evidence of his having beset the invisible company and obtained the policy by just such means as those by which he knew he had been induced to accept it, and listened to the proof of his obtaining it by treachery and guilt in pursuance of a premeditated scheme of fraud with intent to swindle the company in regard to a lien for assessments, or some other matter of theoretical materiality, he was measurably prepared for the next regular charge of having burned his own property.

"With increased experience came a constant expansion of precautionary measures on the part of the companies. When the court held that the agent's knowledge of facts not stated in the application was the company's knowledge and that an unintentional omission or misrepresentation of facts known to the company would not invalidate the policy, the companies, by their agents, issued new editions of applications and policies containing additional stipulations to the effect that their agents were not their agents, but were the agents of the premium payers; that the latter were alone responsible for the correctness of the applications, and that the companies were not bound by any knowledge, statements or acts of any agent not contained in the application. As the companies' agents filled the blanks to suit

themselves, and were in that matter necessarily trusted by themselves and by the premium payers, the confidence which they reposed in themselves was not likely to be abused by the insertion in the application of any unnecessary evidence of their own knowledge of anything, or their own representations, or their dictation and management of the entire contract on both sides. Before that era it had been understood that a corporation—an artificial being, invisible, intangible and existing only in contemplation of law—was capable of acting only by agents; but corporations, pretending to act without agents, exhibited the novel phenomena of anomalous and nondescript, as well as imaginary, beings, with no visible principal or authorized representative; no attribute of personality subject to any law or bound by any obligation, and no other evidence of a practical, legal, physical or psychological existence than the collection of premiums and assessments. The increasing number of stipulations and covenants, secreted in the usual manner, not being understood by the premium payer until his property was burned, people were as easily beguiled into one edition as another, until at last they were made to formally contract with a phantom that carried on business to the limited extent of absorbing cash received by certain persons who were not its agents.

"When it was believed that things had come to this pass, the Legislature thought it time to regulate the business in such a manner that it should have some title to the name of insurance and some appearance of fair dealing."

As the New York standard form of policy is the one most in use, and embraces all that is in other forms, with some provisions that are not in other forms, I will take up its provisions as the foundation of what I have to say to you.

"In consideration of the stipulations herein named and of $..... premium."

The recital in the policy raises a presumption that the premium has been paid, and, if it has not been paid, that is a matter of defense which the company must plead and prove. What will constitute a payment of premium has been often before the courts. It is a rare case in which the premium is actually paid in cash at the time the policy is delivered. Usually, on country property, the premium is settled by note given to the agent. On city property the premium is usually settled by the agent extending a credit to the insured. The policy is delivered to the insured without any demand for premium, the agent charging the insured with the amount of the premium on his books, and charging himself with the amount of the premium in his account with the company.

In Elkins v. Susquehanna Mut. Fire Ins. Co., 113 Pa. 386, 16 Ins. L. J. 78, the agent delivered the policy to the insured, giving the insured credit for the premium, and charged himself, in his account with the company, with the amount of the premium. The agent was responsible for the premium or the return of the policy. The court, in holding that the facts constituted a payment of the premium, says:

"From this it appears that Crane had power, on receipt of a policy, to deliver it to the assured, or to his agent, and to collect the premiums. The company looked to Crane either for a return of the policy or for the premium. Upon delivery of the policy he was obligated to pay the premium as for his own debt. He therefore kept an account with the company and charged himself with the premiums as the policies were delivered, and took credit with any remittances he might make. Now, if it were true, that an arrangement to this effect existed between the company and Crane—and that may be fairly inferred from

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Insuring clause.

the evidence—the arrangement would seem to indicate that the company was content to accept the responsibility of their own agent for such sums as he might receive or otherwise provide for on delivery of the policies, and to substitute the personal liability of the agent in the place of the security which the suspension clause in their contract afforded. This implication is greatly strengthened by the course of business which the agent pursued in the conduct of the company's business. He delivered such policies as he chose and charged the premiums in an account which he kept. He had a running account with Lancaster, and the premiums for this insurance were charged up to Lancaster when the policy in suit was delivered to him. The effect of such a course of business as respects Crane certainly was to substitute the liability of Lancaster for that of the assured. And Lancaster says he usually rendered bills to Mr. Elkins once in three months.

"In view of the course of business pursued by this company with Crane, and by this agent in consummation of their contracts, we think the implication might fairly arise that any absolute requirement of the policy, as to the actual prepayment of the premiums, had been dispensed with, and that the obligation of the agent to pay the premium was, in effect, the payment of it by the insured. If Crane had advanced the money to the company and delivered the policy, no one can doubt that it would have taken immediate effect, and in what respect can there be any difference, in principle, if Crane, with the company's consent, assumed the payment, thus substituting his personal liability in the place of the money? Lancaster became a debtor to Crane and Crane to the company, and this, in view of the course of business pursued, would, as between the insurer and the insured, we think, be equivalent to actual payment."

Other cases to the same effect are:

Pennsylvania Ins. Co. v. Carter, 11 Atl. 102.
Huggins Cracker Co. v. People's Ins. Co., 41 Mo. App. 530.
Bouton v. American Mut. Ins. Co., 25 Conn. 542.
Sheldon v. Connecticut Ins. Co., 25 Conn. 207.
Dayton Ins. Co. v. Kelley, 24 Ohio 345.

Where a broker procures the insurance, and the policy is delivered to the broker to be delivered to the insured, with authority to the broker to collect the premiums, and the broker is charged with the premium by the agent in his account kept with him, this constitutes a payment of the premium.

Bang v. Farmville Ins. Co., 1 Hughes 290.
White v. Conn. Ins. Co., 120 Mass. 330.
Elkins v. Susquehanna Mut. Fire Ins. Co., 113 Pa. 386.

Where the broker is not intrusted by the company with the delivery of the policy and the collection of the premium, and no account exists between the broker and the company, the payment of the premium to the broker in such case is not binding upon the company.

Pottsville Mut. Fire Ins. Co. v. Minnequa Springs Improvement Co., 100 Pa. 137, 11 Ins. L. J. 892.
Peoria Sugar Refinery v. Susquehanna Ins. Co., 20 Fed. 480, 14 Ins. L. J. 333.

It appears from the foregoing cases that the premium may be paid in either of the following ways: (1) By cash or note; (2) by the agent extending credit to the insured and charging himself with the amount of the premium in his account with the company; (3) by the agent charging the broker with the amount

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Insuring clause.

of the premium and charging himself with the premium in his account with the company.

Does Insure.....

Insurance is a contract of indemnity, and it appertains to the person or party to the contract, and not to the property which is subjected to the risk against which its owner is protected. Cummings v. Cheshire County Mut. Fire Ins. Co., 55 N. H. 457, 4 Ins. L. J. 932. It is not a contract running with the land, as in the case of real estate, nor running with the personalty, so to speak, as in the case of a chattel interest of the insured.

Any person who would be subjected to a pecuniary loss in case of the destruction of real or personal property by fire, or other casualty, has an interest in such property which is subject to be insured for his benefit. Care should be taken in the preparation of the policy to name the insured correctly. Initials should be in all cases avoided in writing the name of the insured. The exact interest of the insured in the property should be ascertained, and if such interest be less than the fee simple title, it should be so expressed in the policy. Warehousemen, factors and brokers may insure property in their custody and care in their own name as such. Where two or more persons have a joint interest in property, the name of each and every person interested should be written in the policy, and so if individuals transact business by trade name, the names of the individuals should be written in the policy as well as their trade name.

For the term of ..... from the ..... day of .....
19...., at noon, to the .....day of .....at noon.

The question as to the proper construction to be given to the word "noon" has not been often before the courts. The leading case on the subject is Jones v. German Ins. Co. (Ia.), 29 Ins. L. J. 60, where it is said:

"How shall the exact time of 'noon' be determined by 'common' or 'standard' time? At Creston, Iowa, the latter is seventeen and a half minutes faster than the former, and, as the policy sued on covered the property destroyed 'for one year from the 18th day of September, 1896, at 12 o'clock at noon, to the 18th day of September, 1897, at 12 o'clock at noon,' and the fire broke out on the last day at about 11:45 o'clock a. m., common time, or at two and a half minutes after 12 o'clock, standard time, the rights of the parties depend on the correct solution of this question. The trial court instructed the jury that 'the usual means of determining time of day, when such time is referred to in ordinary contracts, is by the standard of the meridian of the sun, or sun time.' The presumption is that common, or solar, time is the time intended by the parties when reference to the time of day is made in contracts, unless a different standard is shown to have been intended. It may be taken as a presumption from the use of the language, '12 o'clock at noon,' that the parties intended to mean 12 o'clock, sun time, as that phrase is commonly understood. The exigencies of some lines of business may require the adoption of a system which shall definitely fix the same hour and minute at a particular instant at localities widely separated in longitude, so that the delay of, and occasional mistake in, computation may be avoided. Indeed experience had demonstrated the inestimable importance to railroad companies of giving direction to employes everywhere on their lines of road with absolute certainty as to time. Without such certainty, safety would be imperiled. And it may be that, because of

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the relation of transportation companies to the business interests of the community, and the inconvenience of two systems of computing time, it would be wise to use the 'central standard time' throughout the State. But, in the absence of a statutory enactment, we are not quite ready to concede that, for the mere convenience of these companies, nature's timepiece may be arbitrarily superseded. The apparent daily revolution of the celestial body, caused by the rotation of the earth, has, from the remotest antiquity, been employed as a measure of time. The successive returns of the sun do not, it is true, furnish a uniform measure of time, owing to the silghtly variable velocity of the sun's motion and inclination of its orbit to the equator. Certain corrections are necessary, and therefore the imaginary mean sun has been introduced with a uniform velocity. The difference between the apparent or true solar time and the mean solar time, as shown by clocks and watches in ordinary use, is slight. These indicate the time at 12 o'clock when the sun is at meridian at any locality. The law and usage of the country have recognized this method of fixing the time for generations, and it can not be lightly set aside on the mere pretext that certain lines of business so demand. If this were not so, a purely artificial standard of time, reckoned from the ninetieth meridian of longitude, might as well have been adopted, establishing 'central time' for the whole country, instead of dividing the map into four sections, with Eastern, Central,, Mountain and Pacific Standard time. Thus, Saturday might in part be turned into Sunday, and Sunday into Monday, and the period of night when the civil day begins—midnight—made to depend on locality alone. The Supreme Court of Georgia, in deciding that a verdict was returned on Sunday, when standard time was somewhat slower than common time, said: 'It seems idle to waste words in saying that the standard of time fixed by persons in a certain line of business can not be substituted, at will, by persons in a certain locality for the standard recognized by the statutes of the State, as well as the general law and usage of the country, especially when it is considered that such an arbitrary and artificial standard could as easily fix 5 o'clock for midnight as it could twenty minutes past twelve, as was done in this case. Local custom can not in this way change Sunday into Saturday. To expect courts of justice, officers of the law and the public generally (especially that large class of the population who do not live in cities or at railroad stations) to go to the railroads for the time which is to guide them in the performance of their duties under the law, when they have in the heavens above them a certain standard by which to ascertain or regulate the time, or permit them, at will, to follow two standards of time, would be highly impracticable and would be productive of great uncertainty and confusion in the administration of the law. Thus the legality of elections might be made to depend upon conflicting proof of local custom, for what might be considered a legal election in one precinct might be regarded as illegal in the next precinct, because of the time of opening or closing the polls; or the people of a precinct might differ among themselves as to this.' Henderson v. Reynolds (Ga.), 7 L. R. A. 327.

"In Searles v. Averhoff, the Supreme Court of Nebraska, in holding that a defendant who appeared in Justice Court before 11 o'clock, common time, was not in default, though after 11 o'clock, standard time, where, by the summons served, he was required to appear within one hour after '10 o'clock a. m.,' held that: 'The presumption is that common time is that relied upon where there is nothing to show that a different mode of measuring time has been in general use. Where, therefore, the return of a summons is to be made at an hour named, standard time, the summons should so state; otherwise it will be presumed that common time was intended.' There is an additional reason why the time here mentioned should be construed to mean sun time. 'Twelve o'clock' seems to be definitely fixed by the words, 'at noon.' Webster defines 'noon' as 'the middle of the day; midday; the time when the sun is in the meridian; twelve o'clock in the daytime.' Similar definitions are given by the other lexicographers. 'Noon' has, in common parlance, a similar meaning, and refers to the middle of the day; not to a period after or before that. It is the beginning of the sidereal day used by the astronomers, as midnight marks the opening of the civil day. Time, when it concerns a legal duty, should be fixed with reference to a certain, unvarying,

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Insuring clause.

uniform standard and that standard in this State is the meridian of the sun. This appears from the different sections of our code uniformly fixing time by affixing 'a. m.' or 'p. m.' to the hours named, or mentioning 'forenoon' or 'afternoon' of the day. (See Code, Sec. 2448, Subd. 9; id. Secs. 2751, 2754, 3514 and others.) The introduction in evidence of scientific treatises and dictionaries was entirely without prejudice, as the courts, in the instruction quoted, correctly defined what was meant by '12 o'clock at noon.'

"The court submitted to the jury whether, because of a known and established custom obtaining at Creston, the expression, 'at 12 o'clock at noon,' was intended by the parties to the contract to mean 12 o'clock standard time. While it was admitted that central-standard time was in general use there by the railroad company, the schools and business men generally, it does not appear but that the sun time was also used by other people of the city. As common or sun time was presumed to have been intended, the burden was upon the defendant to show to the contrary, and that issue was rightly left for the determination of the jury. But, is it noon at 12 o'clock standard time? If so, just before the change from central to mountain time, at McCook, Neb., and other places on the same degree longitude, the sun reaches the meridian at about half-past 12 o'clock. We are of opinion that it was not only necessary to show the customary use of standard time, but that, by custom of the place, 'at 12 o'clock at noon' meant at 12 o'clock standard time.' "

I have quoted fully from the above case, for the reason that it is the only case in a court of last resort construing this clause in the policy. There was a suit recently in Louisville, Ky., involving this question. Several years ago there was a suit in Ohio in which this question was also involved, and the court rendered an opinion in accordance with the language of the Iowa court. This opinion, however, has not been reported in any of the regular court reporters.

Against all direct loss or damage by fire.

It would seem that there was no room for controversy as to what was intended by this language of the policy. Numerous cases have arisen, however, involving its construction. It is not necessary that the fire should have acted directly upon the property, but if the cause can be traced back to a fire, then the fire is held to be the proximate cause of the loss. The courts hold that this clause of the policy covers all loss or damage which may be directly traced to a fire unintentionally started.

The best illustrative case on this subject is Lynn Gas and Electric Co. v. Meriden Fire Ins. Co., 178 Mass. 570, 22 Ins. L. J. 823, Ins. Dig. (1893) 64.

In this case a fire occurred in the wire tower through which the wires for electric lights were carried from the building. This fire caused a short circuit, and the short circuit resulted in keeping back or bringing into the dynamo below an increase of electric current, that made it more difficult for the armature to revolve than before, and caused a higher power to be exerted upon it; that this was transmitted to the pulley by which this armature was run through a belt. The shock destroyed that pulley, and by the destruction of that pulley the main shaft was disturbed, and the succeeding pulleys, up to the jack pulley, were ruptured. By reason of pieces flying from the jack pulley, or from some other cause, the flywheel of the engine was destroyed,

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the governor broken and everything crushed. The court held that the fire was the direct and proximate cause of the loss.

In Renshaw v. Missouri State, etc., Co. (Mo.), 20 Ins. L. J. 385, Ins. Dig. (1891), p. 61, the court held that the company was liable for damage occasioned by an explosion caused by inflammable gas generated from escaping oil coming in contact with a gas jet which had been left burning in the building.

Loss or damage occasioned by the fall of an adjoining building on fire, or a partition wall by reason of fire in an adjoining building, is covered by the policy. Ermantrout et al. v. Girard F. and M. Ins. Co. (Pa.), 25 Ins. L. J. 87, 9 Ins. Dig. 58.

Where goods have been left in a building which has been damaged by fire, and repairs have been made to the building, and the wall of the building falls twenty-five days after the fire, damaging the goods, the loss is not covered by the policy. Cuesta v. Royal Ins. Co. (Ga.), 27 S. E. 172, 10 Ins. Dig. 93.

If a fire starts in a room in which there is an oil stove, or other stove, and ignites the burner of the stove, the company is liable for the loss or damage resulting from soot from the burning stove. Collins v. Delaware Ins. Co., 9 Pa. Super. Ct. 576, 12 Ins. Dig. 142. But if the damage is caused by soot from a lamp or stove which has been purposely lighted by the insured, then the company is not liable for the resulting damage.

Samuels v. Continental Ins. Co., 2 Pa. Dist. R. 397.

Fitzgerald v. German-Am. Ins. Co., 62 N. Y. Supp. 824, 13 Ins. Dig. 47.

Cannon v. Phœnix Ins. Co. (Ga.), 35 S. E. 775, 13 Ins. Dig. 68.

Damage to boilers by fires in the furnace under them is not covered by the policy. American Towing Co. v. German Fire Ins. Co. (Md.), 20 Ins. L. J. 402, Ins. Dig. (1891), p. 66.

Where a building is torn down or blown up by an order of the civil authorities, to prevent the spread of a conflagration, the courts hold that the loss or damage is the direct result of fire, and is covered by the policy. City Fire Ins. Co. v. Corlies, 21 Wend. (N. Y.) 367; Pentz v. Ætna Ins. Co., 9 Paige (N. Y.) 568.

Direct loss by fire covers loss by moisture directly traceable to water used in extinguishing a fire in an adjacent building.

Boak Fish Co. v. Manchester Fire Assur. Co., 84 Minn. 419, 31 Ins. L. J. 253.

An explosion caused by the lighting of a match is not damage by fire within the meaning of the policy. Mitchell v. Potomac Fire Ins. Co., 183 U. S. 42.

For further cases on this subject see briefs of counsel in the case of Lynn Gas and Electric Co. v. Meriden Fire Ins. Co. et al., 20 L. R. A. 297.

To an amount not exceeding $.....

The effect of this clause is to limit recovery under the policy to the amount written in the policy, whether the damage results from one or more fires.

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In Curry v. Commonwealth Ins. Co. (Mass.), 10 Pick. 535, the policy was for $1,000. The insured suffered a loss, which was adjusted at $142. Thereafter the property was damaged by a second fire. The court held that the amount paid on the first loss should be deducted from the face of the policy, leaving the balance ($858) applicable to the payment of the second loss.

To the same effect is Lattomus v. Farmers' Mut. Ins. Co., 3 Houston (Del.) 404.

While located and contained as described herein, and not elsewhere.

Before the adoption of the standard form of policy this clause usually read "contained in." The courts, in construing this term, held that the words "contained in," where the property insured was necessarily in use outside of the described location, were words of description and not of limitation. That is, that the risk was not confined to the described location, but covered the goods wherever they might be.

Mills v. Farmers' Ins. Co., 37 Ia. 400.

In this case a horse which was insured under the policy was killed six miles away from the place specified in the policy.

McCluer v. Girard Insurance Company, 43 Ia. 349, where the property insured was a phaeton, and was destroyed while in the shop, where it had been left for repairs.

Lonquerville v. Western Assur. Co., 51 Ia. 553, where the property insured was wearing apparel.

Noyes v. Northwestern National Bank Ins. Co., 64 Wis. 415, 15 Ins. L. J. 57, where the property insured was a sealskin dolman, and was destroyed in a fur store, where it had been sent for repair.

To avoid this construction and to confine the risk to the described location, the clause in the standard form was adopted, and it is now generally held that the risk does not follow the goods to any other location than that described in the policy.

Maryland Fire Ins. Co. v. Gusdorf, 43 Md. 506.

London and Lancashire Ins. Co. v. Lycoming Fire Ins. Co., 13 Ins. L. J. 845, 105 Pa. 424.

First National Bank v. Lancashire Fire Ins. Co., 62 Tex. 461, 14 Ins. L. J. 278.

A. & E. R. R. Co. v. Baltimore Fire Ins. Co., 32 Md. 37.

Where merchandise is situated in a building containing several storerooms and the policy does not confine the risk to any particular one of the storerooms, the company will be liable for a loss occurring in any one of them.

Franklin Fire Ins. Co. v. Updegraff, 43 Pa. 350.

West v. Old Colony Ins. Co. (Mass.), 9 Allen 316.

And so, if the description of the location is so general as to bear the construction that the entire building was intended to be

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embraced, the policy will be held to cover the goods in any part of the building.

Clark v. Firemen's Ins. Co., 18 La. 431.
Blake v. Exchange Mut. Fire Ins. Co. (Mass.), 12 Gray 265.
Lieberstien v. Baltic Fire Ins. Co., 45 Ill. 301.
Fair v. Manhattan Ins. Co., 112 Mass. 320.

In this last case the property was described as "contained in the frame building known as the Hunt building, situate in North Hampton, as per plan." At the time the policy issued the main floor was divided into three stores, as shown on the plan, the insured occupying the west store and the other rooms being occupied by other persons. At the time of the fire the insured occupied the whole floor, having removed the partitions. The company contended that the policy covered the goods in the west store only. The court held that the language of the policy included all three of the store rooms; that the reference to the plan was for the purpose of showing the situation of the building with reference to other buildings, and that the insured was entitled to recover for all loss of, or injury to, his goods, in any part of the building.

If it is intended to limit the risk to any particular part of the described building, language should be used so plain that no room is left for construction. Unless the intention clearly and plainly appears from the language used in describing the location that the risk is confined to a particular part of the building, the courts will hold that the goods are covered in any part of the building where they may be at the time of the loss.

In a former talk to your club I considered the written or printed form, and I will therefore not speak of it again. Those of you who were not present at that lecture will find it in full in "Rough Notes" for February 4, 1905.

Entirety of Contract.

The question often arises under a form, whether the contract is an entire and indivisible one or whether it is subject to division. There is perhaps no question in insurance law about which there is greater conflict of authority.

It is usual to include several subjects of insurance in one policy. Thus, one policy may cover a house, barn, household goods, farming implements, hay, carriages, wagons, etc., or a manufactory building and machinery. The policy in such case is issued for a sum in gross, with an apportionment in the written form to the several items insured. For example: A applies for a policy in the sum of $2,000 on his house, household goods, barn and contents therein, with request that the insurance be apportioned to the separate items. The written form would read:

$1,000 on a two-story, frame, shingle-roof house.
300 on household goods contained therein.
300 on a frame barn.
400 on wagons, farming implements, etc., therein.

It often becomes a question in such case, under the forfeiture

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Insuring clause.

clause in the policy, to determine whether such a policy evidences one entire, indivisible contract, or whether it is a separate and divisible contract as to each class of property insured. For example: A, after the issuance of the policy, mortgages the land on which the property is situated, or obtains other insurance thereon, and thereafter a fire occurs. The question then arises: Does this mortgage or other insurance render the policy void as to the personal property insured?

For full information on this subject see Wright v. Fire Ins. Ass'n, 12 Mont. 474; 19 L. R. A. 211, with annotation.

In McQueeney v. Phœnix Ins. Co., 52 Ark. 257; 5 L. R. A. 744, the court considers all the cases and concludes that the contract is indivisible.

Also see:

Havens v. Home Ins. Co., 111 Ind. 90.
Phenix Ins. Co. v. Pickel, 119 Ind. 155.
Rogers v. Phenix Ins. Co., 121 Ind. 570.
Napanee Furniture Co. v. Vernon Ins. Co., 10 Ind. App. 319.
Agricultural Ins. Co. v. Hamilton, 30 L. R. A. 633.
Bills v Hibernia Ins. Co., 87 Tex. 547.
Taylor v. Anchor Mut. Fire Ins. Co., 57 L. R. A. 328.

In this last case the court, after considering the authorities, says:

"We therefore hold on this question, as involved in the case before us, that entirety of premium does not necessarily prove that the contract is indivisible, and that where it appears from the terms of the policy that distinct items or classes of property were separately insured the policy may be valid as to one item or class, although it is invalid as to another item or class by reason of breach of conditions of the policy with reference thereto, provided it appears also, that the risk which it was intended to exclude by the condition which is broken does not apply to the other items or classes of property. In this case a chattel mortgage on the cows and horses could not in any way affect the nature of the risk as to the dwelling house and contents, and therefore we find that a breach of condition in the policy as to the one class of property did not invalidate the insurance as to the other."

This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deductions for depreciation, however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality.

The contract of fire insurance is essentially one of indemnity, and this indemnity must be adjusted on the principle of restoring the insured as nearly as he may be to the situation in which he was at the commencement of the risk. The amount of the insurable interest is the market value of the articles at the time and place of the commencement of the risk, and when they have been purchased near that time and place, the cost to the assured is the most satisfactory, though not the only, criterion of their value. Marchesseau v. Merchants' Ins. Co., 1 Rob. (La.) 438.

Lines 1 to 2.

The Supreme Court of Pennsylvania, in passing on the question of measure of damages in case of loss of a reaping machine, says:

"The measure of damage was that agreed upon in the policy, to-wit: 'The actual cash value at the time of the loss and damage'; also that the option to replace the machinery, if destroyed, was a reservation for the benefit of the company. They were not bound to adopt it. What it would cost, therefore, to replace the reaping machine did not furnish the room for damages which the company must pay to make good the loss. Nor was the fact that the machines insured were constructed under a patent of any importance. Patented or unpatented, what they were worth at the time of the fire was by agreement of the parties to be the measure of their value, and this must be ascertained by testimony as is done in every other case where this value is not fixed." (Commonwealth Ins. Co. v. Sennett, 37 Pa., 205).

In Burgess v. Alliance Ins. Co., 10 Allen 221; 5 Bennett 46, which was an action for loss of property situated in Cuba, the court says:

"The principal question is this: whether, in case of a partial loss of property situated in another country, and insured here, in computing the sum to be recovered, anything is to be allowed for the expense of transmitting to that country the sum of money, which, paid there, would furnish an equivalent for the value of the property destroyed by fire, and we are of opinion that no such allowance can legally be made. In other words, nothing can be added for the cost of exchange in transmitting the funds which are of intrinsically equal value in this country with those which represent the pecuniary measure of the loss in the country where it occurred. * * * It is true that the object of a policy of insurance is indemnity to the insured; but the standard of value used in estimating the value of the loss may not, under all circumstances, produce the result of giving an exact indemnity at the place where a judgment is recovered upon the policy. The best practical rule for indemnity seems to us to be to estimate the loss at the place where it occurred in the currency of that country, and then find the equivalent in the country where suit is brought by determining the actual intrinsic value of the currency of that country as compared with that of the other, thus computing the value according to the real power of exchange."

Insurance is but a contract of indemnity; the indemnity can go no further than the interest of the party who is indemnified, and, if that interest is partial, and not entire, the indemnity does not cover a value incident to ownership. Porter v. Ætna Ins. Co., 2 Flipp. 100; 6 Ins. Law Journal 928.

In Mack v. Lancashire Ins. Co., 2 McCrary 211, "actual cash value" was defined to mean the sum of money the insured goods would have brought for cash at the market price at the time when and place where they were destroyed. Estimated profits can not be added to increase the value. Niagara Fire Ins. Co. v. Heflin, 60 S. W. 393.

The question is not what it would cost to rebuild, but what is shown to be its money value under all the circumstances of its situation and surrounding at the time of the fire. Waynesboro Mut. Ins. Co. v. Creaton, 98 Pa. 451; Hilton v. Phœnix Ins. Co., 42 Atl. 412.

When the policy provides that the cash value of the property destroyed or damaged shall not exceed what would be the cost to the assured of replacing it, and, in case of depreciation from use or otherwise, a suitable deduction shall be made from

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Lines 1 to 2.

the cost of repairing, the measure of damages would be the cost of repairs, if thereby the property is rendered as valuable as it was before; if less valuable than before, then the difference must be added to the cost; and if more valuable, it must be deducted. Commercial Fire Ins. Co. v. Allen, 80 Ala. 571; 16 Ins. L. J. 741; Ætna Ins. Co. v. Johnson, 11 Bush 587. The same rule has been applied to personal property (mill machinery), Vance v. Foster, 2 Crawford Dix Rep., 118 (Irish).

A company insuring goods is liable for their actual market value at the time of loss, not for the cost price, although profits had not been insured. Equitable Fire Ins. Co. v. Quinn, 11 Low. Can. 170; Hoffman v. Ætna Ins. Co., 19 Abb. Pr. 325; Aff'd 32 N. Y. 405.

If the insured is liable for the government tax on whisky insured, the amount of such tax may be included in the estimate of value. Hedger v. Union Ins. Co., 17 Fed 498, 12 Ins. L. J. 926, disapproving of decision in Security Ins. Co. v. Farrell, 2 Ins. L. J. 302 (Ill.), to contrary. Also see Queen Ins. Co. v. McCoin, 49 S. W. 800.

Evidence of what injured goods brought at auction is evidence of their value after the fire. Clemnet v. British-American Assur. Co., 141 Mass. 298.

The amount of recovery on a fire policy insuring stock of material in the hands of a manufacturer is the fair market value at the time and place of destruction. This, notwithstanding it appears that the actual cost of replacing or reproducing would be much less. Mitchell v. St. Paul German Fire Ins. Co., 92 Mich. 594; Parrish v. Virginia F. and M. Ins. Co., 20 Ins. L. J. 95.

As to measure of recovery on building standing on leased ground, see Laurent v. Chatham Fire Ins. Co. in (N. Y.) 1 Hall 41. As to measure of recovery where insurance is by lessee on building, see Niblo v. North American Ins. Co. (N. Y.), 1 Sandf. 551.

Upon issue as to value of house, it is proper to show what the land sold for after the buildings were destroyed, as affording evidence of the value of the buildings, when connected with proof of what both together had before been offered for at sale. Bardwell v. Conway Ins. Co., 122 Mass. 90; contra, Ætna Ins. Co. v. Johnson, 11 Bush (Ky.) 587.

Cost to rebuild is not the proper measure of damages. It is the actual value, or money value under all the circumstances of its situation and surroundings at the time of the fire. Waynesboro Ins. Co. v. Creaton, 98 Pa. 451.

The true measure of damages is the real value of the property, and not its relative value to the assured; and, consequently, where assured had agreed to move the buildings, the amount recoverable is their real value, and not their relative value to the assured for purpose of removal. Washington Mills v. Commercial Fire Ins. Co., 13 Fed. 646, 12 Ins. L. J. 181; Grant v. Elliott Fire Ins. Co., 76 Me. 514; Adill v. Citizens' Ins. Co., 13 Can. L. T. 398.

As to recovery where repairs or rebuilding must conform to certain laws or ordinances of city or State, see Grady v. Northwestern Ins. Co., 11 Mich. 425; Hamburg-Bremen Ins. Co. v. Garl-

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Lines 1 to 2.

ington, 66 Tex. 103; Pennsylvania Co. for Insurance on Lives v. Philadelphia Contributionship, 51 Atl. 351; Hewins et al. v. London Assurance, 68 N. E. 62. In this last case the court distinguished between policies containing a provision that the company shall not be liable, beyond the actual value destroyed by fire, for loss occasioned by law regulating construction or repair of buildings, and those policies which contain no reference to building laws. Also see McCready v. Hartford Fire Ins. Co., 70 N. Y. Supp. 778; Providence-Washington Ins. Co. v. Board of Education, 38 S. E. 679; Larkin v. Glens Falls Ins. Co., 83 N. W. 409. In this last case the court holds that a contract of insurance upon property within the fire limits of a city, and of a class the repair of which is, under certain conditions, prohibited by city ordinances, is presumed to have been entered into with reference to such ordinances, and that recovery may be had as for a total loss when the repair of the building insured and damaged is prevented under and by reason of such ordinances, the value of what remains of a building after the fire, over and above the cost of removing it from the premises, being deducted therefrom.

When property has been condemned by civil authorities and is destroyed by fire before being torn down or removed, the insured is entitled to recover the full value of the property, the same as though no condemnation proceedings had been had. Collingridge v. Royal Exchange Assur. Co., 3 Q. B. D. 173.

One in possession of property under a verbal agreement for its use during his life, may insure the property as his own and recover the full insurance value thereof. Berry v. American Cent. Ins. Co., 132 N. Y. 49.

A tenant for years under a valid lease, who has insured the building for his own benefit, is alone entitled to recover on a policy for loss by fire. Greech v. Richards, 76 Ga. 36; Allen v. Sun Mut. Ins. Co., 36 La. Ann. 767.

These cases will be sufficient to inform you as to how the measure of damage is arrived at in case of loss of building or personal property.

Many of the States have, however, a statute known, in insurance parlance, as "valued policy law." What this law is can best be expressed by quoting to you the provisions of the Wisconsin law, which are as follows:

> "Whenever any policy of insurance shall be written to insure any real property, and the property insured shall be wholly destroyed, without criminal fault on the part of the insured or his assigns, the amount of the insurance written in such policy shall be taken conclusively to be the true value of the property when insured, and the true amount of loss and measure of damages when destroyed."

A few of the States have not gone as far as this, but have made the amount written in the policy prima facie the amount of loss, thus casting the burden of showing the actual loss (if less than the amount written in the policy) upon the company.

The question of what will amount to a total loss under this law has been often before the courts. In Oshkosh Packing and Provision Co. v. Mercantile Ins. Co., 31 Fed. 200; 16 Ins. L. J. 801, the court, after quoting the law, says: "The expression,

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Lines 1 to 2.

'wholly destroyed,' in this statute, is equivalent to total loss; and total loss, as applicable to a building, means not that the materials of which it is composed were all utterly destroyed or obliterated, but that the building, though some part of it remain standing, has lost its identity and specific character as a building, and instead thereof has become a broken mass, or so far in that condition that it can not be properly any longer designated as a building. When that has occurred, then, there is a total destruction or loss, or, as it is said in one of the authorities which treats of the question, a total loss does not mean an absolute extinction. The question is not whether all the parts and material composing the building are absolutely or physically destroyed, but whether, after the fire, the thing insured still exists as a building."

In Missouri it has been held that "a building is wholly destroyed within the meaning of Mo. Rev. St. fixing the measure of damage, only when no part of it above ground remains intact and substantially uninjured so that it can be utilized in effectually restoring the structure in its entirety." Ampleman v. Citizens' Ins. Co., 35 Mo. App. 308; Id. v. North British and M. Ins. Co., 35 Mo. App. 317; Havens v. Germania Fire Ins. Co., 123 Mo. 403. In this last case there were several policies of insurance. The company insisted that the statute had no application to cases of concurrent insurance, but governs only in cases of single policies. Upon this the court says: "This last contention we regard as untenable. We hold that where several concurrent policies of insurance upon real property have been written with the consent of the respective companies, and the property is wholly destroyed by fire, the aggregate amount of such insurance must, under Section 6009, Rev. St. 1879, be taken conclusively to be the true value of the property insured and the true amount of the loss and measure of damage when so destroyed. We think there can be no valid reason why the mere fact that several companies assume each a part of the whole risk should affect the operation of the statute," citing Barnard v. National Fire Ins. Co., 38 Mo. App. 106; Oshkosh, etc., Co. v. Germania Fire Ins. Co., 71 Wis. 454; Queen Ins. Co. v. Jefferson Ice Co., 64 Tex. 578.

In German Ins. Co. v. Eddy, 36 Neb. 461, it was held that, if the debris from the destroyed building was of value and was retained by the insured, the company would be entitled to credit therefor.

For leading article on "Wholly Destroyed," see 33 Central L. J. 319.

For leading article discussing damages where insured has limited interest in the property, see Harvard Law Review 512.

Said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate and satisfactory

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Lines 1 to 2.

proof of the loss have been received by this company in accordance with the terms of this policy.

The discussion of this provision of the policy will be taken up later, under the provision relating to appraisal, found in lines 86 to 91 of the policy, and the provision relating to the payment of losses, found in lines 92 to 95 of the policy.

It shall be optional, however, with this company to take all, or any part, of the articles, at such ascertained or appraised value, and also to repair, rebuild or replace the property lost or damaged with other of like kind and quality, within a reasonable time, on giving notice within thirty days after the receipt of the proof herein required of its intention so to do; but there can be no abandonment to this company of the property described.

The first part of this provision of the policy, namely, "It shall be optional, however, with this company to take all or any part, of the articles, at such ascertained or appraised value," needs no comment. This is one of the provisions of the policy, and, I believe, the only one which the courts have never been called upon to construe. The second part of the provision, which is generally referred to as the repair or rebuilding clause, has been often before the courts.

The provision gives the company the right of paying the loss in two ways: (1) In cash; (2) by replacing the lost or damaged property. If the company elects to pay the loss in the latter way, and so notifies the insured, the contract of insurance is thus converted into a building contract.

Morrell v. Irving Fire Ins. Co., 33 N. Y. 429.
Beals v. Home Ins. Co., 36 N. Y. 522.
Heilmann v. Westchester Fire Ins. Co., 75 N. Y. 7; 8 Ins. L. J. 53.
Wynkoop v. Niagara Fire Ins. Co., 91 N. Y. 478; 12 Ins. L. J. 253.
Good v. Buckeye Mut. Fire Ins. Co., 43 Ohio St. 394.
Fire Ass'n v. Rosenthal, 108 Pa. 474; 15 Ins. L. J. 658.
Zalesky v. Iowa State Ins. Co., 70 N. W. 187; 27 Ins. L. J. 156.
Hartford Fire Ins. Co. v. Peebles Hotel Co., 82 Fed. 546.

As said by the Court of Appeals of New York (Morrell v. Irving Fire Ins. Co., supra), where the company had notified the insured of its election to rebuild: "The contract, then, became one for rebuilding, and the obligation which looked to the payment of the money became obsolete and inapplicable, and the case then became the same which it would have been if the contract had obliged the defendant simply to rebuild, in case of loss."

If the company fails to rebuild, after notifying the insured of its election to rebuild, the action of insured must (in some

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Lines 2 to 6.

States) be based upon the failure of the company to perform its contract to rebuild, and not for the amount named in the policy.

Beals v. Home Ins. Co., 36 N. Y. 429.
American Cent. Ins. Co. v. McLanathan, 11 Kans. 533; 2 Ins. L. J. 907.

To the contrary is the opinion of the Supreme Court of Illinois, in the case of Home Mut. Fire Ins. Co. v. Garfield, 60 Ill. 124; 1 Ins. L. J. 844. In that case the directors of the company notified the insured of their election to rebuild. They delayed in exercising the option, and the insured brought suit upon the policy. In passing upon the right of the insured, the court says:

"It is assumed that this notice changed the policy, changed the entire character of the contract, and that thereby the company agreed to replace the property destroyed without any reference to the amount of the cost. It is urged that the policy is in the nature of an alternative contract, and that the company, in giving the notice and making the election, made it an absolute contract to rebuild, and having failed to rebuild, became liable for all damages for breach of such contract. The policy is not in the alternative to pay a sum of money or to rebuild the house. The language is 'to pay' the sum insured, unless the 'directors shall determine to rebuild.' It is equivalent to saying it will pay a sum certain if it fail to rebuild. The company merely reserved the right to replace the property to avoid the payment of the money. Its liability was for the money, to be discharged by the performance of some other act. This conduct on the part of the company, in giving notice, should be looked upon with disfavor, unless good faith is manifested in all its subsequent proceedings. Upon its determination to rebuild, it should proceed immediately with the work, or be held for the insurance. Upon a lapse of a reasonable time after due notice to rebuild, without prompt measures for such purpose by the company, it is liable for the amount of the policy and interest."

In Langan v. Ætna Ins. Co., 99 Fed. 374, the court held that the policy was not converted into a building contract by notice of the company of its election to rebuild or repair, but that the failure of the company so to do left the policy unchanged, and insured was entitled to demand in money the sum due upon it.

The measure of damage on the failure of the company to carry out its election to rebuild, is the amount it will cost to rebuild, or, if the company has commenced work and abandoned it, the cost of completing the work, although the cost may exceed the amount named in the policy.

Henderson v. Niagara Fire Ins. Co., 91 N. Y. 478; 12 Ins. L. J. 253.
Fire Ass'n v. Rosenthal, 108 Pa. 478; 15 Ins. L. J. 658.
Hartford Fire Ins. Co. v. Peebles Hotel Co., 82 Fed. 546.

In Fire Ass'n v. Rosenthal, supra, the court held that the company is bound to use brick, if the city ordinances so require, although the original material of the structure was not brick; and if the company fails thus to rebuild with brick, the insured may recover as damages the cost of repairing with brick.

The rental value may be taken into consideration in fixing the damages for delay in rebuilding.

Fire Ass'n v. Rosenthal, 108 Pa. 474, 15 Ins. L. J. 658.
Home Mutual Ins. Co. v. Garfield, 60 Ill. 124.

Lines 4 to 6.

If the company proceeds with all due diligence to rebuild, there can be no claim for loss of rent.

St. Paul F. and M. Ins. Co. v. Johnson, 77 Ill. 598; 6 Ins. L. J. 434.

The fact that the insurance is for the benefit of a life tenant can not affect the right of the company to rebuild.

Quarles v. Clayton, 87 Tenn. 308.

Nor the fact that the loss is payable to a third party.

Folman v. Manufacturers' Ins. Co., 1 Cush. 73.

Heilmann v. Westchester Fire Ins. Co., 75 N. Y. 7; 8 Ins. L. J. 53.

The company must notify the insured of its election to rebuild or repair during the time within which it has to pay the loss; and, failing so to do, it can not, after payment of the loss has become due, exercise its rights under the policy.

Maryland Home Fire Ins. Co. v. Kimmel, 43 Atl. 764; 28 Ins. L. J. 729.

If a company elects to reinstate, and is proceeding to do so, and the municipal authorities cause the building to be taken down, as dangerous, the company is not thereby released from liability, although the dangerous condition of the building was not occasioned by the fire. Having elected to reinstate, it must either do so or pay damages for not doing so.

Brown v. Royal Ins. Co., 1 Ell. & Ell. 853 (Eng.)

As to right and liabilities of companies under this clause, where there are two or more policies on the building, see:

Morrell v. Irving Fire Ins. Co., 33 N. Y. 429.

Good v. Buckeye Mut. Fire Ins. Co., 43 Ohio St. 394.

Henderson v. Crescent Ins. Co., 48 La. Ann. 1176.

Hartford Fire Ins. Co. v. Peebles Hotel Co., 82 Fed. 546.

If, after loss, the insured immediately proceeds to rebuild, and refuses to allow the company to do so, after notice, all their liability under the policy ceases.

Beals v. Home Ins. Co., 36 N. Y. 522.

Good v. Buckeye Mut. Fire Ins. Co., 43 Ohio St. 394.

Promise by company to pay the loss when adjusted is waiver of right to rebuild.

Elliott et al. v. Merchants' and D. Ins. Co., 79 N. W. 452; 28 Ins. L. J. 677.

Platt v. Ætna Ins. Co., 153 Ill. 113; 38 N. E. 750; 24 Ins. L. J. 132.

Lancashire Ins. Co. v. Barnard, 49 C. C. A. 559; 11 Fed. 702.

Alliance Co-Op. Ins. Co. v. Arnold, 69 Pac. 164; 31 Ins. L. J. 943.

In McAllaster v. Niagara Ins. Co. (N. Y. S. C.), 32 N. Y. Supp. 535, 84 Hun. 322, the company notified the insured within thirty days after an award, but more than thirty days after receipt of proofs, of its intention to rebuild. The insured disputed the right of the company to rebuild, and that, if it proceeded with the re-

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building of the property, it would do so at its peril. The company rebuilt the property and the insured brought suit for the amount of the loss. *Held*, That the rebuilding of the property was not a defense to which the company was entitled. This case was affirmed on appeal. 50 N. E. 502, 156 N. Y. 80.

In Illinois it has been held that the submission to arbitrators was not a waiver of the right of the company to repair or rebuild.

Platt v. Ætna Ins. Co., 153 Ill. 113; 38 N. E. 580; 24 Ins. L. J. 132.

In Langan v. Ætna Ins. Co., 96 Fed. 705, the court also held that participation in an appraisal was not a waiver of the right to rebuild, where the company signified its election within thirty days after the award was made.

In those States having a valued policy law, the right of the company to rebuild in case of a total loss is denied.

Phenix Ins. Co. v. Levy, 33 S. W. 992; 12 Tex. Civ. App. 45.

Milwaukee Mechanics' Ins. Co. v. Russel, 65 Ohio St. 230; 62 N. E. 338; 31 Ins. L. J. 360.

Marshall et al. v. American Guaranty Mut. Fire Ins. Co., 2 Mo. App. R. 573; 12 Ins. Dig. 90.

Russell v. Milwaukee Mechanics' Ins. Co., 42 Wk. L. B. 325; 12 Ins. Dig. 127.

Commercial Union Assur. Co. v. Meyer, 9 Tex. Civ. App. 7; 26 Ins. L. J. 460.

Orient Ins. Co. v. Levy, 33 S. W. 995.

In Wisconsin, where there is both a valued policy law and a standard form of policy, the court has held that the provision in the standard policy form giving the right to the company to rebuild is not in conflict with the provisions in the valued policy law, and that the company may exercise its option to rebuild, even though there be a total loss.

Temple v. Niagara Fire Ins. Co., 85 N. W. 361; 30 Ins. L. J. 539.

If the building can not be so repaired as to put it in practically the same condition as it was before the damage by fire, the insured is not bound to permit the company to make the repairs.

Northwestern National Ins. Co. v. Woodward, 45 S. W. 185; 16 Ins. L. J. 641.

Commercial Fire Ins. Co. v. Allen, 80 Ala. 571; 1 S. 202.

Where the building ordinances of a city forbid repair or rebuilding, where a building has been damaged more than 50 per cent. of its value, the company is not entitled to repair or rebuild the damaged building.

Larkin v. Glens Falls Ins. Co., 83 N. W. 409; 29 Ins. L. J. 833.

If the company, after a partial loss, elects to repair, and, before it has done so completely, but during the life of the pol-

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icy, the building is again damaged by fire, the company is not entitled to credit for the sum already expended, but must make good the whole loss up to the amount insured.

Smith v. Colonial Mut. Fire Ins. Co., 6 Vict. L. R. 200.

The company will not be liable for a loss caused by the fall of a party wall, which it had not contracted to rebuild, where the owner has left it unprotected from frequent rains, and in an unsafe condition, for two months after the fire, when it fell.

Alter v. Home Ins. Co., 50 La. Ann. 1316; 28 Ins. L. J. 900.

Where the company has duly notified the insured of its election to rebuild, it is not bound, pending an action by the insured, to recover for the loss, to rebuild or attempt to do so.

Kelly v. Sun Fire Office, 141 Pa. St. 10; 21 Atl. 447; 20 Ins. L. J. 407.

The rules deducable from the decided cases are: (1) That the provision in the policy is binding on the insured, except in those States having a valued policy law, without a standard form of policy law. (2) That the company must signify its election to repair or rebuild before the expiration of the time for paying the loss. (3) That submission of the amount of the loss or damage to arbitration is a waiver of the right to repair or rebuild. (4) That the insured is warranted in treating the election of the right to repair or rebuild as a building contract. (5) That the fact that the cost of repairs will exceed the insurance will not relieve the company after it has notified the insured of its election to rebuild. (6) That, if the company does not proceed with due diligence to complete the repairs, it will be liable to insured for loss of rents. (7) That the building ordinances of the city, forbidding certain materials to be used, will not relieve the company from liability for failure to make repairs or to rebuild with more expensive material.

This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein.

In order to avoid the policy under this clause, it is necessary to show that the insured knowingly and intentionally concealed a fact material to the risk, or that, inquiry being made, he misrepresented, either intentionally or unintentionally, the facts regarding the risk.

In the case of Boggs v. America Ins. Co., 30 Mo. 63, the insurance was on a stock of goods described as contained in a certain store. The company claimed that the policy was void by reason of the fact that insured had failed to communicate to the company that the upper part of the building was occupied for a dwelling. The court held that the concealment of that fact was not material unless a disclosure of it would have induced the insurer to decline the risk, or would have enhanced the premium;

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that in contracts of fire insurance it was sufficient if the applicant for insurance made full and true answers to the questions put to him by the insurer. In respect to the subject of insurance, he is not answerable for an omission to mention the existence of other facts, about which no inquiry is made, unless he knows such facts to be material, and intentionally fails to communicate them.

The company must show, in order to avoid recovery on the policy under this clause, both that the insured knew of the material fact, and that it was material to the risk.

Wytheville Insurance and Banking Co. v. Stultz, 87 Va. 629; 20 Ins. L. J. 481.

In this case, the court says:

"It is insisted that it is the duty of insured to disclose every fact which, if known to the company at the time of the issuance of the policy, would have induced the demand for a higher rate, or would have influenced the company in issuing or refusing the said policy; but this can not be true unless such material fact was known to the assured; otherwise the assured is incapable of disclosing them, and, if known to him, he must also have known that the supposed fact was material to the risk. As to the duty of the insured to make every disclosure which is material to the risk, whether questioned concerning the same or not; it is generally true that the insured is bound only to disclose such matters as may be inquired about, and not the particulars of his title, unless the same is inquired about, or unless it is made imperative upon him by some condition of the policy. The rights of the insurer are sufficiently guarded by having it in his power to exact, by inquiry, a description of the interest of the insured, and by the recovery being limited, in case of loss, to the value of the interest proved at the trial. As was said by Judge Moncure in Ins. Co. v. Sheets (26 Grat., 872), quoting from Morrison v. Ins. Co. (18 Mo., 262): 'The man who asks insurance on his property is not aware of the necessity of disclosures which long experience in insurance offices has shown to the underwriter to be necessary, and to hold his policy void, for not making disclosures of the importance of which he is not aware, would be gross injustice.' And again: 'What is material must be determined upon the circumstances of each case. What is material in one case may not be in another, and so a wide field for litigation will be opened. The ends of justice will be best subserved by holding the assured only responsible for fraud. Insurance companies may protect themselves by inquiries in relation of these things and after filling their policies with so much detail and so much minutiæ of information in regard to other matters, as to create the impression that they are satisfied, to hold that they are not bound by their contract, unless informaion of another kind is communicated by the assured, which is not sought for, would be enabling them to commit the rankest injustice.' And Judge Moncure adds: 'These views are very strong and I am decidedly of opinion that they are correct. Nothing more need be added to them.' In Clark v. Ins. Co. (8 How., 235), it is said the relation of the parties is entirely changed, if the insurer asks no information, and the insured makes no representations. But when representations are not asked nor given, and with only this general knowledge the insurer chooses to assume the risk, he must be presumed, in point of law, to do so at his peril."

To the same effect is Commonwealth v. Hide and Leather Ins. Co., 112 Mass. 136.

German Mutual Fire Ins. Co. v. Niewedde, 11 Ind. App. 624.
Browning v. Home Ins. Co., 71 N. Y. 508.

The following have been held to be concealments of fact, avoiding the policy:

Lines 7 to 9.

Threats to burn the insured building, which were known to the insured and not made known to the company.

Curry v. Commonwealth Ins. Co., 10 Pick. 535.

Repeated attempts to burn adjoining building, and not disclosed to the company.

Walden v. Louisiana Ins. Co., 12 La. 134.

Failure to disclose that other persons have an interest in the property.

Hebner v. Palatine Ins. Co., 157 Ill. 144.
Sisk v. Citizens' Ins. Co., 16 Ind. App. 565.

Failure to disclose that the insured building stood on leased ground.

Mackinnon v. Mut. Fire Ins. Co., 89 Ia. 170.

Failure to disclose that the property was mortgaged.

Westchester Fire Ins. Co. v. Weaver, 70 Md. 536.

Failure to disclose that a house insured as a dwelling and lodging house was, in fact, used for immoral purposes.

Weigle v. Cascade F. and M. Ins. Co., 12 Wash. 449.

The following have been held not to be concealment of fact avoiding the policy:

Failure of insured to state that she is a married woman.

Queen Ins. Co. v. Young, 86 Ala. 424.

Failure to disclose that a mortgage had been foreclosed, no inquiry having been made.

Essex Sav. Bank v. Meriden Fire Ins. Co., 57 Conn. 335.

The failure of insured to disclose that another person has an interest in the profits of the business.

Traders' Ins. Co. v. Pacaud, 150 Ill. 245.

Failure of insured to disclose that he is the sole owner of a business insured in the name of "G. & Co."

In re Pelican Ins. Co., 47 La. Ann. 935.

Failure of insured to state that his interest in the property is an equitable one only, there being no inquiry made.

Gilman v. Dwelling House Ins. Co., 81 Me. 488.
Depreau v. Hibernia Ins. Co., 76 Mich. 615.

Failure to state the existence of a mortgage, no inquiry being made.

Hall v. Niagara Fire Ins. Co., 93 Mich. 184.
Cross v. Ins. Co., 132 N. Y. 133.

Failure of insured to state that he fears loss by incendiaries.

Smith v. Home Ins. Co., 47 Hun. 30.
Sanford v. Royal Ins. Co., 11 Wash. 653.
German-American Ins. Co. v. Morris, 100 Ky. 29.

From the foregoing cases, the rule may be announced to be that, if the insured applies for insurance and, upon inquiry being made, falsely answers any questions put to him, or conceals any fact inquired about, then he can not recover on the policy; but if no inquiry is made of the insured, and the policy is issued to him without requiring him to make any statements concerning

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Lines 7 to 9.

the title, occupation or condition of the risk, then the insured can not be held guilty of any concealment or false representations, and the company will be held to have waived the violation of any condition of its policy existing at the time the same was issued, for the reason that it failed to inquire concerning the same.

In case of any fraud or false swearing by insured touching any matter relating to this insurance or the subject thereof, whether before or after the loss.

In construing this clause, the Supreme Court, in the case of Claflin v. Commonwealth Ins. Co. et al., 110 U. S. 81, says:

"The object of the provisions in the policies of insurance, requiring the assured to submit himself to an examination under oath, to be reduced to writing, was to enable the company to possess itself of all knowledge, and all information as to other sources and means of knowledge in regard to the facts, material to its rights, to enable it to decide upon its obligations, and to protect it against false claims. And every interrogatory that was relevant and pertinent in such an examination was material, in the sense that a true answer to it was of the substance of the obligation of the assured. A false answer as to any matter of fact, material to the inquiry, knowingly and willfully made, with intent to deceive the insurer, would be fraudulent. If it accomplished its result, it would be a fraud effected; if it failed it would be a fraud attempted. And if the matter were material and the statement false, to the knowledge of the party making it, and willfully made, the law presumed every man to intend the natural consequences of his acts. No one can be permitted to say, in respect to his own statements upon a material matter, that he did not expect to be believed; and if they are knowingly false and willfully made, the fact that they are material is proof of an attempted fraud, because their materiality, in the eye of the law, consists in their tendency to influence the conduct of the party who has an interest in them, and to whom they are addressed. * * * It is no palliation of the fraud that Murphy did not mean thereby to prejudice them, but merely to promote his own personal interest in a matter not involved in the contract with them. By that contract, the companies were entitled to know from him all the circumstances of his purchase of the property insured, including the amount of the price paid and in what manner payment was made; and false statements, willfully made under oath, intended to conceal the truth on these points, constituted an attempted fraud by false swearing which was a breach of the conditions of the policy, and constituted a bar to the recovery of the insurance."

In Linscott v. Orient Ins. Co., 88 Me. 497, the court construes this clause as follows: False swearing consists in knowingly and intentionally stating upon oath what is not true. The statement of a fact as true which the party does not know to be true, and which he has no reasonable ground for believing to be true, is fraudulent.

If the insured willfully and falsely states in proofs of loss that certain insured property was destroyed when in fact it was not, there can be no recovery, notwithstanding that the actual loss as truly stated exceeded the sum for which the property was insured.

Doloff v. Phœnix Ins. Co., 82 Me. 266.

Where the insured willfully raises the amounts of copies of invoices, so as to show purchases greater than were in fact made, and verifies them by his affidavit, there can be no recovery.

Home Ins. Co. v. Winn, 42 Neb. 331.

Lines 9 to 10.

In Lion Fire Ins. Co. v. Star, 71 Tex. 733, the court held that false swearing, either by the insured or by a witness in his behalf, willfully resorted to by the insured, defeated his right to recover on the policy.

In Virginia F. and M. Ins. Co. v. Vaughan, 88 Va. 832, insured swore to a loss in excess of what was actual, and furnished false vouchers in support of his claim, for which no explanation was made. The court held that he could not recover.

In the case of Dohmen Co. v. Niagara Fire Ins. Co., 96 Wis. 38, the court says that "the effect of the clause is that any trick, artifice or deception, practiced with the object of securing some advantage in the adjustment or payment of a loss under a policy of insurance to the prejudice of the company, and liable to have that effect, avoids the policy."

For other cases holding that the insured forfeited his rights by fraud or false swearing, see:

Fowler v. Phœnix Ins. Co., 35 Ore. 559.
Worachek v. New Denmark Mut. Home Fire Ins. Co., 102 Wis. 88.

In Tubb v. Liverpool, L. and G. Ins. Co., 106 Ala. 651, the court held that false swearing by the insured in proof of loss as to the value of the goods destroyed, to avoid the insurance, must have been willfully and knowingly done, with a fraudulent purpose; that an innocent mistake, misstatements or fraudulent over-valuation do not constitute a defense.

To the same effect is American Cent. Ins. Co. v. Ware, 65 Ark. 336.

In the case of Commercial Ins. Co. v. Friedlander, 156 Ill. 595, the insured, in his proofs of loss, stated the amount of his loss to be $9,840. The jury returned a verdict only for the sum of $1,277.80. The company contended that the discrepancy between the amount claimed and the amount of the verdict established a fraudulent over-valuation within the meaning of the policy. The court, in holding that fraud was not established, says:

"The mere fact that the assured, in the proofs of loss, has made an overvaluation of the property destroyed, will not defeat a recovery on the policy for the actual loss sustained. If the assured, in making proofs of loss, acts in good faith, on the honest belief that the property destroyed was worth the amount of the valuation placed upon it, and the excessive valuation was not intended to deceive or defraud the insurance company, such overvaluation can not be held to be fraudulent and it will not defeat a recovery. Ins. Co. v. Nelson, 75 Ill. 548; Ins. Co. v. Vaughan, 92 U. S. 516. There are numerous cases found in the books where the recovery has been sustained, although much less than the amount of loss as the same was estimated in the proofs of loss. National Bank v. Hartford Fire Ins. Co., 95 U. S. 673; Moore v. Ins. Co., 29 Me. 97; Dogge v. Ins. Co., 49 Wis. 501, 5 N. W. 889; Helbing v. Ins. Co., 54 Cal. 156."

Also see:

Home Ins. Co. v. Mendenhall, 164 Ill. 458.
Vergeront v. German Ins. Co., 86 Wis. 425.
Hilton v. Phœnix Ins. Co. (Me.), 28 Ins. L. J. 309; 42 Atl. Rep. 412.
Erb v. German-American Ins. Co., 98 Ia. 606.

Lines 9 to 10.

Where, in an examination after loss, insured makes false statements, such statements will not forfeit his rights under the policy, unless shown to have been made intentionally and with knowledge of their falsity.

Huston v. State Ins. Co., 100 Ia. 402.
Naillie v. Western Assur. Co., 49 La. Ann. 658.

For other cases construing this provision of the policy, see:
Atherton v. British America Assur. Co., 91 Me. 289.
Towne v. Springfield F. and M. Ins. Co., 145 Mass. 582.
Knop v. National Fire Ins. Co., 101 Mich. 359.
Phœnix Ins. Co. v. Summerfield, 70 Miss. 827.

In the case of Springfield F. and M. Ins. Co. v. Winn, 27 Neb. 649, the court construes this clause as follows:

"To constitute fraud there must have been misrepresentations before the fire in regard to a material fact, by reason of which the policy was fraudulently procured, or other fraud which would compel payment for property not destroyed or not insured; that in the absence of fraud up to the time of loss, when the parties' rights became fixed, a willful misrepresentation by insured as to the amount of his loss, if the actual amount thereof is in excess of the insurance, will not cause a forfeiture."

In the case of Barnard v. People's Fire Ins. Co., 66 N. H. 401, the court held that where the statute makes the amount insured, in case of total loss, the measure of the company's liability, a grossly excessive and false statement of value in the proofs of loss does not prevent the recovery of the sum insured.

Also see:
Lion Fire Ins. Co. v. Star, 71 Tex. 733.
Sullivan v. Hartford Fire Ins. Co., 89 Tex. 665.
Morotock Ins. Co. v. Fostoria Novelty Co., 94 Va. 361.
Deitz v. Providence-Wash. Ins. Co., 33 W. Va. 526.
Commercial Bank v. Firemen's Ins. Co., 87 Wis. 297.
Kahn v. Traders' Ins. Co., 4 Wyoming 419.

The law on this subject may be said to be that if the insured, in an examination under oath after loss, falsely answers any of the questions put to him regarding the loss, he thereby forfeits all his rights under the policy; but that false statements or overvaluation in proofs of loss will not foreit the rights of the insured under the policy, unless it be shown that the same were willfully and falsely made with the intent to deceive.

This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void, if the property insured——

This is the provision of the policy preceding the conditions rendering it void for any of the enumerated causes found in lines 12 to 30, inclusive. It would seem that this provision was sufficiently plain to preclude all controversy, yet no provision of the policy has been oftener before the court.

The courts of New York have uniformly held that, where an agent of the company issued a policy of insurance on property where a cause for forfeiture existed at the time, the com-

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Lines 9 to 10.

pany is estopped to claim a forfeiture by reason of the fact that written consent to the condition was not endorsed upon the policy, if the agent, at the time, knew the real state of facts or issued the policy without making inquiry.

Forward v. Continental Ins. Co., 142 N. Y. 382, and cases therein cited.

The Supreme Court of Michigan, in the case of Hoose v. Prescott Ins. Co., 11 L. R. A. 340, in construing this provision of the policy, says:

"Now, the object sought to be accomplished by the person applying for insurance was to obtain indemnity against loss by fire of her interest in the building. If the insurance company who made out this policy upon the verbal application to its agent had desired to know what interest it was insuring, it should have stated it in that part of the policy pertaining to the risk. It was the intention of these parties to issue a valid and binding contract of insurance, valid and binding from the time of acceptance of the same by the assured, not that after it had been accepted by the assured then the assured should apply to the company and obtain its consent in writing indorsed on the policy, stating that the assured was the sole and unconditional owner of the property, or, stating that the building intended to be insured stood on ground owned in fee simple by the assured, or stating by indorsement on the policy the interest which the assured had in the property covered by the insurance, and yet the language of this part of the policy is that the entire policy, and every part thereof, shall become void—that is, void, in the future, unless such consent in writing is indorsed by the company thereon. To give any reasonable force and effect to this clause of the policy it can only be held to apply to such changes as arise after the policy has been delivered and accepted in the ownership of the property, or, if a building stood upon leased ground, the ownership of the building; and it does not apply to an existing state or condition of the property at the time the policy was issued."

In the recent case of German-American Ins. Co. v. Yeagley (Ind. S. C.), 71 N. E. 897, the court, after exhaustively reviewing the authorities, says:

"Our conclusion upon this branch of the case is that if the appellant issued the policy sued upon, and accepted and retained the premium for the insurance, with knowledge that there was a chattel mortgage on the subject of the risk, it must be taken to have waived the condition declaring the policy void if the property insured should be so incumbered, and also those provisions of the contract requiring the waiver to be endorsed upon the policy."

The rule seems to be firmly established that this provision of the policy does not apply to facts existing at the date the insurance is written, and that the failure of the agent to make the proper endorsements upon the policy, either through negligence, after knowledge of facts, or by failure to make inquiry and inform himself thereof, will not be available to the company as a means of defeating recovery under the policy. The subject of waiver will be treated later, when I come to consider the concluding paragraphs of the policy.

Insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy.

This provision of the standard form of policy is a change

Lines 11 to 13.

from the conditions in the policy previous to the adoption of the standard form. In the previous policies, the words, "whether valid or not," were omitted, so that, in order to avoid the policy, it was necessary that it be shown that the other insurance was valid and enforcible. Under the standard form, all that is necessary to be shown is, that the insured holds a policy which, upon its face, constitutes other insurance. Invalidity of such other policy has no bearing on the question.

The words, "whether valid or not," were inserted to prevent any controversy as to validity or invalidity of a policy claimed to be other insurance, and can not be disregarded.

Continental Ins. Co. v. Hulman, 92 Ill. 145.

To constitute "other insurance," the policy must be upon the same interest and the same subject or risk.

McLachlan v. Ætna Ins. Co., 4 Allen 173.
Sloat v. Royal Ins. Co., 49 Pa. 14.
Ross v. Merchants' Mut. Ins. Co., 27 La. Ann. 409.
Wheeler v. Watertown Fire Ins. Co., 131 Mass. 1.

In the case of Phenix Ins. Co. v. Lamar, 106 Ind. 513, the court says:

"The contract is, that other insurance, 'whether valid of not,' taken without the written consent of the insurance company, shall render the policy void. It was agreed that the validity or invalidity of other insurance, taken without the written consent of the insurer, should not be the subject of future contract. Any contract of insurance, so held or accepted, was to render the policy in suit void. This agreement was not against public policy, nor prohibited by law. So far as appears, it was with a full comprehension of its terms, deliberately entered into. It is, therefore, to have effect according to its plain and obvious meaning." (Northwestern Mutual Life Ins. Co. v. Hazelett, 105 Ind., 212; Continental Ins. Co. v. Hulman, 92 Ill., 145, (34 Am. R., 122); Liverpool, etc., Ins. Co. v. Verdier, 35 Mich., 395).

"So far as appears, the policy in the Germania Insurance Company was regarded both by the insurance company which issued it, and the insured, as being valid and in force at the time the policy in suit was accepted, as well as when the loss occurred. Whatever we might conclude in respect to the ordinary condition concerning further insurance, we are clear that where parties, as in the case before us, have stipulated in their contract that other insurance, whether valid or not, shall avoid the policy, the effect of such a stipulation can not be avoided by showing that the prohibited insurance was invalid.

"As applicable to a policy embracing a condition of that description, this general principle may be stated: If the prohibited policy, held or received by the insured, is in and of itself invalid and void, so that it in fact constitutes no contract of insurance, it will not effect the validity of that under which the claim for indemnity is made. But if to avoid it, requires the production of facts extraneous to the policy, it will be within the condition against further insurance, and unless consented to will render the other voidable."

The usual permit for other insurance is in the form: "Other concurrent insurance permitted;" or, "$..... concurrent insurance permitted."

In New Jersey Rubber Co. v. Commercial Union Assur. Co., 30 Ins. L. J. 55, the court defines "concurrent insurance" as "that which, to any extent, insures the same interest against the same casualty, at the same time as the primary interest, on such terms that the insurers would bear proportionally the loss happening

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Lines 11 to 13.

within the provisions of both policies. It is this last quality, of sharing proportionally in the loss, that distinguishes concurrent insurance from mere double insurance. The permission of concurrent insurance, in contrast with the requirements, gives the insured an option as to the time when he will procure other insurance, the length of its duration, and the property it shall cover, provided it shall proportionally aid the primary insurer in bearing whatever loss may occur within the range of their common operation."

The court in that case held, that the fact that the latter policy covered goods not insured by the first policy, did not render the policies non-concurrent.

For other cases construing this term, see:

Washburn-Halligan Coffee Co. v. Merchants' Brick Mut. Fire Ins. Co., 29 Ins. L. J. 234.
Corkery v. Security Fire Ins. Co., 26 Ins. L. J. 331.
Gough v. Davis, 24 N. Y. Misc. 245.

It is held that, by attaching a co-insurance clause to the policy, requiring the insured to maintain a certain per cent. of insurance, the company assents to other insurance; and that the insured need not notify the company of the procurement of other insurance or obtain additional consent thereto.

Dolan v. Missouri Town Mut. Fire Ins. Co., 88 Mo. App. R. 666.
Palatine Ins. Co. v. Ewing et al., 92 Fed. 111; 28 Ins. L. J. 461.
Pool v. Milwaukee Mechanics Ins. Co., 65 N. W. 54.

In this last case, the court says:

"While this writing, so attached, does not expressly authorize such additional insurance without consent, yet it does, by necessary implication, authorize the same, and makes it an object for the plaintiff to take additional insurance, until the 80 per cent. of the actual cash value of the property should be obtained."

The Connecticut Supreme Court, however, holds that the co-insurance clause does not supersede the provision against other insurance, and that, notwithstanding the co-insurance clause requiring 80 per cent. insurance to be carried, the insured must procure written consent to other insurance.

Cutler v. Royal Ins. Co., 70 Conn. 566.

In view of the conflict in the decisions, I deem it advisable to have an express permit for other insurance endorsed on the policy, although there may be a co-insurance clause attached requiring the insured to maintain insurance to a certain per cent. of the value of the property.

If the subject of insurance be a manufacturing establishment and it be operated in whole or in part at night later than ten o'clock, or if it cease to be operated for more than ten consecutive days.

This provision of the policy, like all others, is subject to the

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Lines 11 to 13.

general rules of waiver or estoppel, and hence, if the company or its agent knew, at the time of the issue of the policy, that the manufacturing establishment was run all night, or later than ten o'clock, this knowledge operates as a waiver of the operation of the establishment, and estops the company to deny its consent thereto.

American Cent. Ins. Co. v. McCrea (Tenn.), 8 Lea 513.
Couch v. Rochester German Ins. Co., 30 N. Y. St. Rep. 54.

Where, however, there is no waiver, the policy is avoided by running the factory after ten o'clock.

Reardon v. Faneuil Hall Ins. Co., 135 Mass. 121.

The Supreme Judicial Court of Massachusetts, in the case of Stone v. Howard Ins. Co. (and two other companies), 153 Mass. 475, holds that goods manufactured and in process of manufacture do not constitute a part of the manufacturing establishment, so that the suspension of operations in the factory will defeat the insurance on them under this provision of the policy.

The court, in these same cases, however, holds that the building, machinery, fixtures, tools and appliances are part of the factory, and that the insurance as to these items is avoided by a cessation of operations. In these cases, the court says:

"The insurance upon a manufacturing establishment includes insurance upon everything that goes to make up that establishment; and, on the other hand, insurance upon a part of such an establishment must be deemed to be an insurance upon the establishment, within the meaning of the clause referred to."

In Carlin v. Western Assur. Co., 57 Mo. 515; 12 Ins. L. J. 388, the court, in holding that a "flour mill" was a manufacturing establishment, gives the following definition:

"We think, therefore, that the plaintiff's flour mill, driven as it was by steam, and furnished with a middling purifier, bran-duster, belting and other machinery, was clearly a 'manufacturing establishment.'"

The Supreme Court of Illinois, in American Fire Ins. Co. v. Brighton Cotton Mfg. Co., 125 Ill. 131; 17 Ins. L. J. 749, thus defines "cease to be operated":

"What is the meaning to the words 'cease to be operated,' as used in the policy? The operation of a large manufacturing establishment means doing everything necessary for its successful and profitable management. It would necessarily be the work of many hands, and the operation would be multiplied many fold. The duties of the many employes would be quite dissimilar, and entirely independent of each other, but all necessary to either the profitable or successful operation of the factory. It would be the duty of some to buy the raw material to be manufactured, of others to run the engines to drive the spindles, of others to control and manage the carding and spinning, of others to put up and label the goods for the market, of others to make sales and take orders for goods as fast as manufactured, of others to deliver or ship goods when sold, and of others to perform such duties as may be necessary to be done, and which it would be needless to enumerate. The ceasing to perform any one thing, for the time being, of the many required to be done, would certainly not be to 'cease to operate the factory.' Any one might be temporarily suspended, and yet the factory be said to be in successful operation. 'Carding and spinning' is not all that is included in a 'cotton factory.' There must be the engine to drive the machinery, and fuel to make steam. The goods, when manufactured, must

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be sold and shipped or delivered; and the doing of any one of these many things is a part, and even an essential part, of the operation of a large factory. Nor is the ceasing to do any one of them for a shorter or longer period ceasing to operate the factory. 'Carding and spinning' is no more all of the operation of a great factory, than the sale of the fabrics when produced. Many, very many, things are included in the operations of a factory, the doing of which is necessary to its successful management. The operating of an extensive factory does not mean it shall be kept employed in all its various departments every day; that is, all the time. It would be unreasonable to construe the contract in this policy that it means the factory, in all its departments, shall be kept in ceaseless motion. No one supposes it means that. It may properly be closed down over Sundays and all legal holidays, or for any cause that a prudent manager of such establishment would deem prudent and best for the interest of the owners. On the same principle, one department may be kept in operation, and others cease temporarily. It might be, the fabrics manufactured might be in excess of the sales or the demands of trade, and for that reason a prudent superintendent might deem it best to stop the spindles and the looms for a season, or sales might be in excess of the supplies, and for that reason no goods would be contracted for a time. Would any one say that such partial stoppages would be a violation of the contract of insurance contained in the policy in suit? So narrow a construction would make the contract of no value to the assured, and to observe it would render the usual and ordinary management of such an establishment impracticable."

The Supreme Court of Michigan, in City Planing and Shingle Mill Co. v. Merchants', etc., Mut. Fire Ins. Co., 72 Mich. 654; 18 Ins. L. J. 197, gives the following definition of the term "cease to be operated":

"The stoppage of the mill was occasioned solely by the want of logs to manufacture. The logs were expected daily, and their not being received was not the fault of plaintiff. It was a mere temporary suspension, which, in the first place, was supposed would only last a few days, and after that from day to day. This clause can not mean that a stoppage of this kind for a day, or even a week, for want of running material, an event quite likely to occur once or more in any season, would be considered 'ceasing to operate.' The policy speaks of premises becoming vacant or unoccupied, 'or if a mill or manufactory, it shall cease to be operated.' This must mean something more than a temporary suspension. It must mean a closing with the intention of ceasing operation, not a shutting down for a few days or weeks because of the happening of events, incident to the conducting of a mill in that locality, and which might be reasonably expected, such as the want of logs because of low water, which caused the suspension in this case."

The court cited the following cases:

Whitney v. Ins. Co., 72 N. Y. 120.
Ins. Co. v. Leathers, 8 Atl. 424.
Ins. Co. v. Manufacturing Co. (Ill.), 17 N. E. 776.
Stupetski v. Ins. Co., 43 Mich. 373.
Shackelton v. Fire Office, 55 Mich. 288.
Poss v. Ins. Co., 7 Lea 704.

Or if the hazard be increased by any means within the control or knowledge of the insured.

The question of increase of risk is generally one for the determination of a jury. This clause is construed to mean such a change in the circumstances, interest and surroundings as will increase the hazard of damage or loss. It does not include any use of the premises, or of any article by the insured, which the

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nature of the occupancy or use of the premises necessarily require. It does not include a mere temporary increase of risk, but it must have continued up to the time of the fire.

Schmidt v. Peoria F. and M. Ins. Co., 41 Ill. 295.
Westchester Fire Ins. Co. v. Foster, 90 Ill. 121.
Gates v. Madison County Ins. Co., 5 N. Y. 469.
Mayor, etc., New York v. Hamilton Fire Ins. Co., 39 N. Y. 45.

To the contrary, see:

Concordia Fire Ins. Co. v. Johnson, 4 Kans. App. 7.
Kyte v. Commercial Union Assur. Co., 149 Mass. 116.

The increase of risk need not, however, be the cause of the fire.

In Crance v. City Ins. Co., 3 Fed. Rep 558, the court says that the words "increase the risk" should be construed as meaning essential and material increase of risk.

The following have been held to be an increase of risk per se:

Erection of frame addition to the insured building, putting in it a fireplace and stove.

Roberts v. Chenango Co. Mut. Fire Ins. Co., 3 Hill 501 (N. Y.)

Putting printing office into storeroom.

Hervey v. Mutual Fire Ins. Co., 11 Up. Can. C. P. 394.

Distilling liquor in building where risk is described as "barley and malt in assured's malthouse and brewery".

People's Ins. Co. v. Spencer, 53 Pa. 353.

Erecting factory building adjoining insured dwellings.

Allen v. Massasoit Ins. Co., 99 Mass. 160.

Putting in large stove for use in drying naphtha which had been dried by steam.

Daniels v. Equitable Ins. Co., 50 Conn. 55.

Erecting additional house on lot so as to eliminate clear space.

Pottsville Ins. Co. v. Horan, 89 Pa. 438; 10 Ins. L. J. 771.

Erection of lumber drying house within six or seven feet of factory building.

Cole v. Germania Fire Ins. Co., 99 N. Y. 36; 14 Ins. L. J. 453.

Using engine for shelling corn.

Davis v. Western Home Ins. Co., 81 Iowa 496; 20 Ins. L. J. 363.

I call your attention to note to this case in 10 L. R. A. 359.

Storing of loose hay in building.

Alston v. Greenwich Ins. Co., 100 Ga. 282.

Keeping fireworks in building containing insured property.

Betcher v. Capital Fire Ins. Co. (Minn.), 80 N. W. 971.

Lines 14 to 15.

Renting ordinary storeroom for a tinshop.
Manufacturers and Merchants' Ins. Co. v. Kunkle (Pa.), 6 W. N. C. 234.

If mechanics be employed in building, altering or repairing the within described premises for more than fifteen days at any one time.

Before the adoption of the standard form of policy this provision was so worded as to make the policy void in case any carpenters or mechanics should be engaged in making alterations or repairs. The courts construed this provision not to apply to ordinary and reasonable repairs rendered necessary by use of the premises, but that it only applied to extraordinary alterations and repairs covering a considerable period.

James v. Ins. Co., 4 Clifford 272.
Harper v. Ins. Co., 17 N. Y. 198.

To avoid this construction, the fifteen days limitation on the right to make alterations or repairs during any one year was put in the policy. The reason for the change is thus stated in the case of German Ins. Co. et al. v. Hearne, 117 Fed. 289:

"In effect, the companies said to the insured: In order that there may be no room for question in the future concerning the character and extent of the work that may be done upon the insured premises, we agree that you may do whatever you please to the building, whether the change would be accurately described as building, or as altering, or as repairing, without asking our consent and without being obliged to consider whether or not the risk is thereby increased; and you may do this for fifteen days. But if the work you do is so extensive that it requires more than fifteen days to finish it, then we require you to give us notice, in order that we may take such steps as we may then see fit. We shall then have knowledge of what you are doing, and we can decide whether it may go on, or whether it is so dangerous as to require us to cancel the policy altogether, or to demand that the increase of hazard shall be compensated by an increase of premium."

In that case the insured bought a large and handsome residence in Pittsburg. He engaged a firm of contractors to make some alterations and repairs therein, which alterations and repairs required more than fifteen days in their completion. No structural change was contemplated, and none was made by the work done. The court, in holding that the insurance was forfeited by violation of the provision of the policy, says:

"To our minds, the meaning of the provision already quoted is plain and clear, as we have endeavored to explain; and it only remains to add that the work done by the mechanics employed for Mr. Hearne was certainly 'repairing,' even if it were neither 'building' or 'altering.' The clause under consideration is of comparatively recent date, and only a few cases have been found in which it has been examined by the courts of last resort. None of them decides the precise point raised by this writ of error, although we think that the reasoning of Newport Imp. Co. v. Home Ins. Co., 163 N. Y., 237, 57 N. E., 475, justifies us in citing that case as affording support to the conclusion we have reached."

If the interest of the insured be other than unconditional and sole ownership.

This provision of the policy has led to much litigation, and

Lines 15 to 16.

the courts have stretched the construction to the utmost in order to hold the company and protect the insured, though in some of the cases it would seem that the construction is extremely harsh as against the insured. Thus, in the case of Syndicate Ins. Co. v. Bohn et al., 12 C. C. A. 531; 27 L. R. A. 614, the insured were the sole stockholders, being the sole owners of a building. They formed a corporation and transferred the building to such corporation, they taking the entire capital stock thereof. The building had been insured in their individual names prior to the formation of the company, and thereafter the agent, without making inquiry as to any change in the title, renewed the insurance in their individual names. The court, in holding that the insured were not the sole and unconditional owners of the building, says:

"Stockholders of a corporation are entitled to a distributive share of its profits while it continues in operation, and, at its dissolution, to a just proportion of the proceeds of the corporate assets remaining, if any, after all the corporate debts are paid, but they are far from being the unconditional owners of the property of the corporation. The title and ownership of such property is vested in the corporation itself—in an entity as distinct and separate from its stockholders as in any individual trustee from his cestui que trust. The corporation itself can sell, convey, mortgage, and deal with the corporate property as its own, subject only to the restrictions of its charter, while its stockholders can do none of these things. These stockholders were not, therefore, the sole or unconditional owners of the property described in these policies."

One who has gone into possession of property under a land contract of purchase, and who has paid a portion of the purchase price and entered into an undertaking to pay the balance, his contract requiring him to keep the building insured, is the sole and unconditional owner of the property.

Dupreau v. Hibernia Ins. Co. (Mich.), 5 L. R. A. 71.
Bottom v. Iowa Cent. Ins. Co., 25 Ia. 328.

Where, however, the property is purchased on the installment plan and the title is reserved in the seller until all installments are paid, the purchaser is not the sole and unconditional owner of the property.

Dumas v. Northwestern Nat'l Ins. Co., 40 L. R. A. 358.

In Veebe v. Ohio Farmers' Ins. Co. (Mich.), 18 L. R. A. 481, the court holds that each of two persons owning in severalty respective shares of personal property insured, is the "absolute owner" of the property within the meaning of the policy.

For other cases construing this clause where several parties have an undivided interest in the property, see note to this last case in 18 L. R. A. 481.

Sole and unconditional ownership is not affected by the existence of a mortgage on the property.

Hubbard v. Hartford Fire Ins. Co., 33 Ia. 325.
Clay Fire Ins. Co. v. Beck, 43 Md. 358.

The existence of a lien or unpaid purchase money does not prevent the insured from being the sole and absolute owner.

Millville Mut. Fire Ins. Co. v. Wilgus, 88 Pa. 107.
Wooddy v. Old Dominion Ins. Co. (Va.), 31 Grat. 362.

Lines 16 to 17.

In Miller v. Alliance Ins. Co., 18 Blatch. 308, the court held that so long as insured under claim of right had the exclusive use and enjoyment of the property without any assertion of an adverse right or interest by any other person, he was the owner of the property.

Where the buildings are owned by one partner, the partnership is not the sole and unconditional owner within the meaning of the policy.

Citizens' Fire Ins. Co. v. Doll, 35 Md. 89.

In Reaper City Ins. Co. v. Brennan, 51 Ill. 158, the court holds that when property has been sold on a judgment and execution against the insured, the title of the property can not be said to be "entire, unconditional and sole".

Where the buildings are owned by one partner, the partnermoney and taxes, he is not the sole and unconditional owner of the property within the meaning of the policy.

Hinman v. Hartford Fire Ins. Co., 36 Wis. 159.

And so, where the insured is in possession under a verbal gift and promise to convey, and has paid taxes and made improvements, he is not the absolute, sole and unconditional owner.

Wineland v. Security Ins. Co., 53 Md. 276.

The owner of an undivided interest is not the sole and unconditional owner of the property.

Miller v. Amazon Ins. Co., 43 Mich. 463; 10 Ins. L. J. 1081.

In Iowa it is held that a life estate is not an absolute interest.

Davis v. Iowa State Ins. Co., 67 Ia. 494; 15 Ins. L. J. 533.

Garver v. Hawkeye Ins. Co., 69 Ia. 202.

A surviving partner, who is also the administrator of the deceased partner's estate, is not the unconditional and sole owner of the partnership property; nor is he made so by the fact that he has paid the firm debts out of his own means and is entitled to be reimbursed out of such property.

Crescent Ins. Co. v. Camp, 71 Tex. 503.

From a study of the foregoing cases, it appears that insured is not required to be the holder of both the equitable and legal title to the insured property in order to be considered the unconditional and sole owner of the property. It is sufficient if he holds the equitable title.

If the subject of insurance be a building on ground not owned by the insured in fee simple.

An estate in fee simple is the largest estate in land known to the law. It is an estate of inheritance, unlimited in duration. The owner has full power of disposal of it during his life; and on his death, if undisposed of, it goes to his heirs.

Am. and Eng. Enc. of Law.

This provision speaks for itself, and is meant to cover those cases where buildings are erected upon ground to which the insured has neither the legal nor equitable title. I do not find

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Lines 16 to 17.

that this clause has ever been construed except in connection with the clause concerning unconditional and sole ownership.

If the subject of insurance be personal property and be or become encumbered by a chattel mortgage.

This provision is a valid one, and if the property is incumbered by chattel mortgage at the time the policy is issued, the failure of the insured to disclose such mortgage avoids the policy.

Crikelier v. Citizens' Ins. Co., 168 Ill. 309.
Shaffer v. Milwaukee Mechanics Ins. Co., 17 Ind. App. 204.

A mortgage that has been paid, although not discharged of record, is not an incumbrance within this provision of the policy.

New Orleans Ins. Ass'n v. Holburg, 64 Miss. 51.
Lang v. Hawkeye Ins. Co., 74 Iowa 673.

The fact that the mortgage is recorded as required by law, and that the law provides that such recording shall be notice of the existence of a mortgage, does not excuse the insured from giving notice thereof.

Wicke v. Iowa State Ins. Co., 90 Ia. 4.

A material increase of an existing mortgage without notice to the company, is a violation of this provision and avoids the policy, though the company had notice of the original mortgage.

Kansas Farmers' Fire Ins. Co. v. Saindon, 53 Kans. 623.

In Crook v. Phœnix Ins. Co., 38 Mo. App. 582, the incumbrance was $110 more than insured stated it to be. The court holds that this avoids the policy. Upon this same point, see Smith v. Agricultural Ins. Co., 118 N. Y. 518.

Where a stock of goods is incumbered by a chattel mortgage, such mortgage applies to subsequently acquired goods added to the stock, so as to vitiate the policy as to these.

Gray v. Guardian Assur. Co., 31 N. Y. Supp. 237.

Where an existing mortgage of which the company has notice is renewed, or a new mortgage executed with which to secure money to pay off such existing mortgage, there being no increase in the amount of the incumbrance, such renewal or new mortgage will not avoid the policy.

Dougherty v. German-American Ins. Co., 67 Mo. App. 526.
Koshland v. Home Ins. Co., 31 Ore. 321.
Lycoming Fire Ins. Co. v. Ward, 90 Ill. 545.

In Johansen v. Home Fire Ins. Co., 54 Neb. 548, the court holds that the execution of a mortgage after the issuance of a policy would not avoid the insurance if such mortgage was paid off before the loss.

The rules deducible are (1) that the existence of an undisclosed chattel mortgage avoids the insurance; (2) that any material difference in the amount of the mortgage over and above

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Lines 17 to 18.

that stated by the insured, will avoid the policy; and (3) that a mere change in the incumbrance, as by renewal of an existing mortgage or the execution of a new mortgage which does not materially increase the amount of the original incumbrance, will not avoid the insurance.

If, with the knowledge of the insured, foreclosure proceedings be commenced, or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed.

Under this provision it has been held that the policy becomes void immediately on the commencement of foreclosure proceedings, without any act or notice on the part of the company.

Meadows v. Hawkeye Ins. Co., 62 Ia. 387; 13 Ins. L. J. 377.
Quinlan v. Providence-Washington Ins. Co., 15 N. Y. Supp. 317; 133 N. Y. 356.

The fact that the company assents to the mortgage can not be extended by construction so as to include the foreclosure proceedings as a necessary incident of the mortgage.

Titus v. Glens Falls Ins. Co., 81 N. Y. 410.

Where, however, the policy is issued to the mortgagee, it is held that foreclosure proceedings by the mortgagee and the acquiring by him of the complete title to the property under such proceedings does not avoid the policy.

Esch v. Home Ins. Co., 78 Ia. 334; 19 Ins. L. J. 113.
Weiss v. American Fire Ins. Co., 23 Atl. 991.

In Fitzgibbons v. Merchants and Bankers' Mut. Fire Ins. Co. (Ia.), 101 N. W. 454, the policy insured both real and personal property. There was a mortgage on the real property, and suit to foreclose same had been instituted before the loss. The court, in holding that the foreclosure proceedings did not avoid the policy, says: "The condition of forfeiture which this policy provides is the institution of foreclosure proceedings against the 'property insured'." The "property insured" consists in part of the dwelling house covered by the mortgage and in part of personal property to which no mortgage or other lien has ever attached; and the foreclosure proceedings did not, therefore, involve the property insured, and no forfeiture resulted.

If any change, other than by the death of an insured, take place in the interest, title or possession of the subject of insurance (except change of occupants without increase of hazard), whether by legal process or judgment or by voluntary act of the insured, or otherwise.

Under the New York standard form of policy, the death of the insured does not affect the policy, and it is not necessary to give any notice to the company of the death of the insured.

Quarles v. Clayton, 87 Tenn. 308; 10 S. W. 505.

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Under other forms of policies the death of the insured may avoid the policy in the absence of notice to the company.

Sherwood v. Agricultural Ins. Co., 73 N. Y. 447.
Hine v. Woolworth, 93 N. Y. 75.

In Illinois it has been held that where the policy is payable to "A, his executors, administrators or assigns," the death of the insured did not avoid the policy, although the company has no notice of the change.

Forest City Ins. Co. v. Hardesty, 182 Ill. 39.
Forest City Ins. Co. v. Eaton, 86 Ill. App. 463.

Under this condition, an absolute sale of the insured property will, of course, void the policy, as the insured would no longer have an insurable interest in the property.

The proper construction of this clause, where the insured retains some insurable interest in the property, is not so easy of solution, and there is some conflict in the authorities. In some States it is held that the execution of a mortgage of the insured property does not effect a change in the interest, title or possession.

Taylor v. Merchants and Bankers' Ins. Co. (Ia.), 21 Ins. L. J. 117.

A sale by one partner to another of his interest in the partnership property has been held not to conflict with this clause in the policy so as to avoid the interest of the purchasing partner in the property.

Allemannia Fire Ins. Co. v. Peck, 133 Ill. 220.
Hobbs v. Memphis Ins. Co. (Tenn.), 1 Sneed 444.
Burnett et al. v. Eufaula Home Ins. Co., 46 Ala. 11.
West v. Citizens' Ins. Co., 27 Ohio St. 1.
Virginia F. and M. Ins. Co. v. Vaughan, 14 S. E. 754.
Lockwood v. Middlesex Ins. Co., 47 Conn. 553.
N. O. Ins. Ass'n v. Holberg, 64 Miss. 51.

To the contrary are the following cases:

Dreher v. Ætna Ins. Co., 18 Mo. 128.
Finley v. Lycoming Ins. Co., 30 Pa. 311.
Dix v. Mercantile Ins. Co., 22 Ill. 272.
Malley v. Atlantic Fire Ins. Co., 51 Conn. 222; 13 Ins. L. J. 38.
Hathaway v. State Ins. Co., 64 Iowa 229.

My own opinion is that a conveyance by one partner of all his interest to another partner does effect a change in interest and title within the meaning of the policy, and that the policy is avoided thereby.

The following have been held to be within the meaning of this clause:

Possession by sheriff under execution.

St. Paul F. and M. Ins. Co. v. Archibald, 16 Ins. L. J. 153.

A lease of insured premises.

Wenzel v. Commercial Ins. Co., 67 Cal. 438; 14 Ins. L. J. 809.

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Smith v. Phœnix Ins. Co. (Cal.), 23 Pac. 383.
Fire Ass'n v. Flournoy (Tex.), 19 S. W. 793.

Execution of mortgage with power of sale.
Sessaman v. Pamlice Ins. Co., 78 N. C. 145.
Schumitsch v. American Ins. Co., 48 Wis. 26.

Foreclosure of mortgage.
Commercial Union Assur. Co. v. Scammon, 102 Ill. 46; 11 Ins. L. J. 578.

Execution of mortgage.
East Texas Fire Ins. Co. v. Clarke, 79 Tex. 23; 20 Ins. L. J. 820.

Contract for sale of property, and receipt of part of purchase price.
Germond v. Home Ins. Co. (N. Y.), 2 Hun. 540.

Transfer of equitable title to property.
Cottingham v. Fireman's Fund Ins. Co., 20 Ins. L. J. 187.

The following are held not to be within this clause in the policy:

Temporary absence of occupants of dwelling.
Shearman v. Niagara Fire Ins. Co., 46 N. Y. 526.

Partial vacancy of house.
Bryan v. Peabody Ins. Co., 8 W. Va. 605.

Letting building to tenants.
Rumsey v. Phœnix Ins. Co., 17 Blatch. 527.
Alkan v. New Hampshire Ins. Co., 53 Wis. 136; 11 Ins. L. J. 126.

Execution of mortgage.
Hartford Fire Ins. Co. v. Walsh, 54 Ill. 164.
Quarrier v. Peabody Ins. Co., 10 W. Va., 507.
Aurora Fire Ins. Co. v. Eddy, 55 Atl. 213.
Bryan v. Traders' Fire Ins. Co., 145 Mass. 389.
Chadbourne v. German-American Ins. Co., 31 Fed. 533; 16 Ins. L. J. 897.

Appointment of a receiver.
Keeney v. Home Ins. Co., 71 N. Y. 396.

Invalid sale of property.
Pitney v. Glens Falls Ins. Co., 65 N. Y. 6.
Kitterlin v. Milwaukee Ins. Co., 134 Ill. 647.

If this policy be assigned before a loss.

The contract of insurance is a personal contract with the insured, and the policy does not pass, so as to continue the liability of the company, to an assignee or purchaser of the property insured unless the company assents to the transfer. The company is not absolutely bound to consent to the transfer, but may withhold consent without giving any reasons therefor.
Home Ins. Co. v. Lindsey, 26 Ohio St. 348.

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The fact that the insured assigned the policies some time before requesting consent of the company thereto, is immaterial if the company consents to the assignment before the loss.

Gould v. Dwelling House Ins. Co., 134 Pa. 570.

An assignment endorsed on the policy to take effect after the company has consented thereto, but which was not delivered because the company withheld consent, does not affect the rights of the insured.

Smith v. Monmouth Mut. Fire Ins. Co., 50 Maine 96.

A deposit of the policy, as a pledge, with creditors is not an assignment of the policy within the meaning of this clause.

Ellis v. Kreutzinger, 27 Mo. 11.

An assignment by a debtor of all his property for the benefit of his creditors, operates as an assignment of his policy of fire insurance, and renders it void.

Dube v. Mascoma Mut. Fire Ins. Co., 64 N. H. 527.

As to whether the policy is affected by the acts of the assignor after the assignment, the authorities are conflicting. In the case of New England F. and M. Ins. Co. v. Wetmore, 32 Ill. 221, the court held that the assignee's rights were not affected by the acts of the assignor.

To the contrary is the case of Pupke v. Resolute Fire Ins. Co. 17 Wis. 378.

After a loss the insured may assign the policy and claim without consent of the company.

Perry v. Merchants' Ins. Co., 25 Ala. 355.
Walters v. Washington Ins. Co., 1 Ia. 404.
West Branch Ins. Co. v. Helfenstein, 40 Pa. 289.

If illuminating gas or vapor be generated in the described building (or adjacent thereto) for use therein; or if (any usage or custom of trade or manufacture to the contrary, notwithstanding) there be kept, used or allowed on the above described premises, benzine, benzole, dynamite, ether, fireworks, gasoline, Greek fire, gunpowder exceeding twenty-five pounds in quantity, naphtha, nitroglycerine or other explosives, phosphorous, or petroleum or any of its products of greater inflammability than kerosene oil of the United States standard (which last may be used for lights and kept for sale according to law, but in quantities not exceeding five barrels, provided it be drawn and lamps filled by daylight or at a distance not less than ten feet from artificial light).

In the following cases it was held that the use of gasoline avoided the policy:

German Fire Ins. Co. v. Board of Commissioners, 54 Kans. 732.
Turnbull v. Home Fire Ins. Co., 83 Md. 312.
McFarland v. St. Paul F. and M. Ins. Co., 46 Minn. 519.
Kohlmann v. Selvage, 34 Hun's App. 380.

Lines 22 to 28.

In this last case the insured rented a platform in the rear of insured building to a marketer, who attached to the outside wall a gasoline lamp.

Fischer v. London and L. Ins. Co., 83 Fed. 807.

In this case the insured had a small quantity of gasoline for use in exhibiting gasoline stoves.

Naphtha: when use of avoids the policy.

Wheeler v. Traders' Ins. Co., 68 N. H. 326-450.

The fact that prohibited articles are kept on the premises of insured without his knowledge or consent does not relieve him from the forfeiture.

LaForce v. Williams City Fire Ins. Co., 43 Mo. App. 518.

Liverpool and L. Ins. Co. v. Gunther, 166 U. S. 113.

Fireworks: when keeping of fireworks avoids policy.

Heron v. Phœnix Mut. Fire Ins. Co., 180 Pa. St. 257.

Drawing oil or filling lamps by artificial light voids the policy.

Gunther v. Liverpool and L. and G. Ins. Co., 134 U. S. 110.

Vandervolgen v. Manchester Fire Assur. Co. (Mich.), 82 N. W. 46.

When the business in which the insured is engaged necessarily requires him to keep gasoline, naphtha, etc., on the premises, the keeping of such articles will not have the effect to avoid the policy, though no special permit be attached thereto.

Smith v. German Ins. Co., 107 Mich. 270.

Renshaw v. Mo. State Mut. F. and M. Ins. Co., 103 Mo. 595.

In this last case a store room in the building was rented for a grocery and the grocer had about forty gallons of gasoline in a tank.

Lancaster Silver Plate Co. v. Manchester F. Assur. Co., 170 Pa. St. 166.

In this case it appeared that gasoline was absolutely necessary in the business, and was in ordinary use.

American Cent. Ins. Co. v. Green, 16 Tex. Civ. Appeals 531.

Where insured used gasoline in a stove for cooking purposes:

Phœnix Ins. Co. v. Shearman, 17 Tex. Civ. Appeals 456, where the gasoline was used in connection with other ingredients in making gas.

Where the written or printed form attached to the policy covers all goods "usually kept for sale in such stores, the keeping of gasoline, kerosene, etc., on the premises, is impliedly permitted.

Yoch v. Home Ins. Co., 90 Ky 236.

Mascot v. First Nat'l Fire Ins. Co., 69 Vermont 116.

Faust v. American Fire Ins. Co., 91 Wis. 158.

Phenix Ins. Co. v. Walters (Ind.), 56 N. E. 257.

The keeping and using of product of petroleum which is less

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inflammable than kerosene oil of the United States standard, will not avoid the policy.

Grand Rapids Hydraulic Co. v. American Fire Ins. Co., 93 Mich. 396.

In Snyder v. Dwelling House Ins. Co., 59 N. J. Law 544, the court held that this provision in the policy did not prohibit the use of kerosene in an oil stove, but was a regulation of kerosene oil for lighting purposes only.

The keeping of gasoline, benzine, etc., by the insured, in a building near the insured building, is not within the prohibition of the policy.

Rau v. Westchester Fire Ins. Co., 36 Hun's App. 179.

For a very full discussion of this provision of the policy, I refer you to a leading article in 58 Central Law Journal 343.

A study of these cases must convince you that great care should be exercised in preparing the written or printed form. The phrases, "and all other goods kept for sale"; and "other goods owned by insured"; and "other goods usually kept for sale in like stores", should be avoided.

If a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied, and so remain for ten days.

The Court of Appeals of New York, in the case of Herman v. Adriatic Fire Ins. Co., 85 N. Y. 162; 10 Ins. L. J. 743, construes this clause in the policy as follows:

"A dwelling house is chiefly designed for the abode of mankind. For the comfort of the dwellers in it, many kinds of chattel property are gathered in it. So that in the use of it, it is a place of deposit of things, inanimate, and a place of resort and tarrying of beings, animate. With those animate far away from it, but with those inanimate still in it, it would not be vacant, for it would not be empty and void. And as a possible case, with all inanimate things taken out, but with those animate still remaining in it, it would not be unoccupied, for it would still be used for shelter and repose. And it is because that in our experience of the purpose and use of a dwelling house, we have come to associate our notion of the occupation of it, with the habitual presence and continued abode of human beings within it, that word applied to a dwelling always raises that conception in the mind. Sometimes indeed, the use of the word vacant as applied to a dwelling, carries the notion that there is no dweller therein; and we should not be sure always to get or convey the idea of an empty house, by the words vacant dwelling applied to it. But when the phrase, "vacant or unoccupied," is applied to a dwelling house, plainly there is a purpose, an attempt to give a different statement of the condition thereof by the first word, as an empty house, by the second word as one in which there is not habitually the presence of human beings."

In the case of Halpin v. Phenix Ins. Co., 118 N. Y. 165; 19 Ins. L. J. 289, the policy described the property as "occupied as a morocco factory". Some time previous to the fire the factory had been idle. All the machinery remained on the premises, but the building was closed and locked and in the hands of an agent for rent. The agent had a key, and made frequent visits to the

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property. The court, in construing this clause upon these facts, says:

"It was not in the contemplation of the parties to the contract under consideration that the building insured should be the home or place of abode of any person, and the decisions relating to similar provisions in policies upon dwellings are not material except to show that while a dwelling house will not be regarded as occupied unless it is the home or dwelling place of some person, yet, temporary absence, leaving the property for a short period unoccupied, will not be regarded as a breach of the condition, while absence for a fixed definite period even with an intention to return and occupy the property will violate the condition and render the policy void. * * * To constitute occupancy of a building used for manufacturing purposes, there must be some practical use or employment of the property. Its use as a place of storage merely is not sufficient. The condition against non-occupancy must be construed and applied in reference to the subject-matter of the contract and of the ordinary incidents attending the use of the insured property. * * * There is nothing in the evidence to indicate that the business of manufacturing leather would necessarily be resumed by any one, but even if it was intended to rent it for such purpose only, it was at the time of the fire abandoned as a place of business, and without practical use or employment, and the insurer was therefore deprived of the care which would have been exercised over the property had it been so employed. Under such circumstances, we think it was unoccupied within the meaning of the policy."

In the case of American Ins. Co. v. Padfield, 78 Ill. 167, the tenant who had occupied the house moved out of the house, taking all his household furniture excepting a few articles. The court, in holding that the house was both vacant and unoccupied, says:

"The presence of these articles in the house did not constitute an occupancy, nor do they relieve the house from the charge of being vacant, either in the popular or in the legal and technical sense of that word.

"The words "vacant and unoccupied," as used in the policy, should be construed with reference to the subject matter of the contract and the obvious purposes for which such a stipulation was inserted therein. The design of the stipulation was manifestly to secure the insurance company against such change in relation to the occupancy as might tend to increase the liability of the building to destruction by fire.

"At the time the policy was issued the insured warranted the insurer that the building was occupied as a dwelling by a tenant. Such occupancy involved necessarily the presence of furniture and other personal property of value to the assured, and which he would be presumed likely to care for and to seek to preserve from destruction. It also involved the presence of a tenant inhabiting the building, and exercising over it such care and vigilance as might be expected from ordinary men.

"The occupancy here stipulated for is something substantial and actual. There is no room for constructive occupancy, if such a thing is possible. The occupancy which the parties to the contract must be deemed to have had in view, was one which would have some substantial and tangible relation to the safety of the property. A mere constructive possession would not be such occupancy. * * * 'An occupant is one who has the actual use or possession of a thing.' Redifield v. Utica-Syracuse R. R. Co., 25 Barb., 54, 58; Bouv. Law Dict., title, Occupant.

"We submit, then, that the dwelling house in question being vacant and unoccupied at the time of the loss, the policy, by its own express terms, was void."

For other cases construing this term, see:
Imperial Fire Ins. Co. v. Kierman, 83 Ky. 468.

Lines 28 to 30.

Stupetski v. Transatlantic Fire Ins. Co., 43 Mich. 343.
Cook v. Continental Ins. Co., 70 Mo. 610.
Fitzgerald v. Connecticut Fire Ins. Co., 64 Wis. 463.
Bennett v. Agricultural Ins. Co., 51 Conn. 504.
Ashworth v. Builders' Mut. Fire Ins. Co., 112 Mass. 422.

A mill building is not vacant and unoccupied within the meaning of the policy where a number of employes are retained in service and are actually engaged about their usual work in the mill up to and on the day of the fire, and all the plant and some of the material and manufactured goods are there.

American Fire Ins. Co. v. Brighton Cotton Mfgr. Co., 125 Ill. 131.
Brighton Mfg. Co. v. Reading Fire Ins. Co., 33 Fed. 232.
Traders' Ins. Co. v. Race (Ill.), 15 Ins. L. J. 633.

In Hartford Fire Ins. Co. v. Smith, 3 Col. 422, it was held that a building does not become vacant or unoccupied if a person retains a room therein in which he is accustomed to sleep, taking his meals elsewhere.

Where a tenement block is insured as a single building, it is not vacant or unoccupied if any of the tenements are actually in use and occupation as residences.

Harrington v. Fitchburg Ins. Co., 124 Mass. 126.

In Phœnix Ins. Co. v. Tucker, 92 Ill. 64, insured was engaged in moving from the insured premises. His family had left, but he remained on the premises, having retained bed, bedding and some other articles of little value in the house for his use. He was about the premises on Saturday until about nine o'clock in the evening, when he went to the city and spent the balance of the night. On Sunday he returned to the premises and remained there until about seven o'clock in the evening, when he went to the city and spent the night. The fire occurred Sunday night. The court held that the premises were not vacant and unoccupied within the meaning of the policy.

Where a family leaves the house on excursions, visits, or on other temporary occasions, there being no intention of abandoning it as a residence, there is no violation of the policy condition.

Stupetski v. Transatlantic Ins. Co., 43 Mich. 373; 9 Ins. L. J. 521.

In Schuerman v. Dwelling House Ins. Co., 161 Ill. 437, it was contended that vacancy without the knowledge of the insured would not avoid the policy; that the insured had a reasonable time within which to learn of the vacancy, where the premises were occupied by tenants, and apply for vacancy permits. The court held that the forfeiture and avoidance of the policy does not depend on the insured's knowledge of the fact of vacancy.

If the insured property becomes vacant, the length of time elapsing after the vacancy and before the fire is wholly immaterial. The insurance ceases immediately upon the occurrence of the vacancy.

Farmers' Ins. Co. v. Wells, 42 Ohio State 519.
Bennett v. Agricultural Ins. Co., 50 Conn. 420.

Lines 28 to 30.

In this case the court says:

"The contract is neither obscure nor ambiguous, and there is no room for interpretation. It is true that the building burned within a few hours after the building was vacated, but under this clause in the policy we are unable to see that time is material."

Upon the fact of the ignorance of the insured as an excuse for the vacancy, the Supreme Court of Missouri, in the case of Cook v. Continental Ins. Co., 70 Mo. 610, says:

"It was plaintiff's business, under the policy, to see that the house was occupied. If she had put a tenant in possession under a lease for a month or year, and four days previous to the fire the tenant had vacated the premises and taken another house, her agreement with that tenant would not have availed her in a suit with the insurance company."

The Supreme Court of Iowa, in the case of Dennison v. Phœnix Ins. Co., 52 Iowa 457, in passing on the question, says:

"It is not a question of how long this state of things may exist without the knowledge of the assured. He is bound by the terms of his policy to see to it that his house does not become vacant, or give notice, etc. The question as to whether the building was occupied for a reasonable or unreasonable length of time is wholly immaterial. The time is only material in determining whether the building is in fact vacant or unoccupied within the meaning of the contract. The only material consideration is, was this building vacant and unoccupied, and did it so remain until destroyed by fire?"

I also call your attention to East Texas Fire Ins. Co. v. Smith, 3 Tex. Civ. Appeals 281.

This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or commotion or military or usurped power, or by order of any civil authority.

The leading case construing this provision of the policy is Ætna Ins. Co. v. Boone et al., 95 U. S. 117. In that case the federal troops were attacked by a superior force of the confederate troops, and were compelled to retreat. The officers in command of the federal troops ordered the insured building, which contained military stores, to be burned. In holding that the company was not liable, the court says:

"In the present case, the burning of the city hall and the spread of the fire afterwards was not a new and independent cause of loss. On the contrary, it was an incident, a necessary incident and consequence of the hostile rebel attack on the town—a military necessity caused by the attack. It was one of a continuous chain of events brought into being by the usurped military power—events so linked together as to form one continuous whole. Hence it must be concluded that the fire which destroyed the plaintiffs' property took place by means of an invasion or miltary or usurped power and that it was excepted from the risk undertaken by the insurers."

In the case of Portsmouth Ins. Co. v. Reynolds (Va.), 32 Grat. 613, the insured property was destroyed by fire started by and under the orders of officers of the United States government. At the time, the ordinance of secession had passed the Legislature, but had not been submitted to the people for ratification. The court held that the ordinance of secession being then inoperative, Virginia could not be regarded as a foreign state or coun-

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Lines 28 to 30.

try, so as to make the act of the United States troops an invasion on the part of the United States, and that hence the loss was not within the exception.

For other cases construing this clause of the policy, see:

Barton v. Home Ins. Co., 42 Mo. 156.

City Fire Ins. Co. v. Corlies (N. Y.), 21 Wend. 367.

A riot is defined as a "tumultuous disturbance of the peace by three persons or more assembling together of their own authority, with an intent mutually to assist one another against any who should oppose them in the execution of some enterprise of a private nature, and afterwards actually executing the same in a violent and turbulent manner, to the terror of the people, whether the act inflicted were of itself lawful or unlawful."

American and Eng. Enc. of Law.

In the case of Dupin v. Mutual Ins. Co., 5 La. Ann. 482, the court upheld the validity of this provision, and said that in such case it is immaterial that the rioters originally assembled for a lawuful purpose, but were afterwards guilty of riot.

In Lycoming Fire Ins. Co. v. Schwenk, 95 Pa. 89, the evidence showed that eight or ten men exchanged shots with the watchman, set fire to a coal breaker and drove off the watchman. The court held that this was a riot within the meaning of the policy.

In Germania Fire Ins. Co. v. Deckard, 3 Ind. App. 361, the evidence showed that five masked men, in the nighttime, assembled and broke into the building, compelling the occupants to vacate, under threats of violence, and then burned the building. The court held that this constituted a riot and that the company was not liable.

As to liability of company in case of loss by order of civil authority, see Pages 19 to 22.

Or by theft.

This clause in the policy has been held to exempt the company from liability where goods were stolen while being removed from a building which was on fire or which had been burned, although the policy requires the insured to use his best endeavors for saving and preserving the property.

Webb v. Protective, etc., Co., 14 Mo. 3.

Liverpool and L. and G. Ins. Co. v. Creighton, 51 Ga. 95.

Neglect of the insured to use all reasonable means to save and preserve the property at and after the fire, or when the property is endangered by fire in neighboring premises.

It is held that this clause does not require insured to use means to restore the property to its condition before the fire, but only to take the necessary steps to prevent its final destruction or other deterioration, and to put it in a condition to be examined.

Huffman v. Ætna Fire Ins. Co., 1 Robt. 501; 32 N. Y. 405.

The neglect of the insured must be such as to amount to a willful, wanton or fraudulent act, in order to relieve the company from liability under this clause.

Phœnix Ins. Co. v. Sullivan, 39 Kans. 449.

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Where the evidence shows such willful and wanton neglect, there can be no recovery under the policy.

Ellsworth et al. v. Ætna Ins. Co., 89 N. Y. 186.

(Unless the fire ensues, and in that event, for the damage by fire only)—by explosion of any kind, or lightning; but liability for direct damage by lightning may be assumed by a specific agreement hereto.

If a fire precedes the explosion and the explosion is caused by such fire, then the company is liable for the entire loss.

Washburn v. Miami Valley Ins. Co. et al., 2 Fed. Rep. 633.

In this case the court says:

"There is nothing here which in terms withdraws the protection against fire, although that fire should involve an explosion * * *. It was a part of that fire, just as much a part of the fire, and covered by the insurance, as if there had been no explosion."

Also see La Force v. Williams City Fire Ins. Co., 43 Mo. App. 518.

In Tanneret v. Merchants' Ins. Co., 34 La. Ann. 249, where the explosion preceded the fire and caused the fire, it was held that the company was not liable.

In support of this rule also see:

Briggs v. North British and M. Ins. Co., 53 N. Y. 446.

Miller v. London and Lancashire Fire Ins. Co., 41 Ill. App. 395.

In the case of Heuer v. Northwestern National Ins. Co., 144 Ill. 393, the court held that damage to goods by an explosion of gas is not a loss by fire within the meaning of the policy, where the goods were not burned or damaged by the falling of a floor caused by the explosion, although the explosion was produced by the lighting of a match.

I call your attention to a very full annotation to this case collecting the authorities in 19 L. R. A. 594.

" Lightning" is construed as including the presence of any disruptive discharge of electricity, and when accompanied by a tornado, the question should be submitted to the jury, whether the destruction or damage is caused by wind or electricity.

Spensley v. Lancashire Ins. Co., 54 Wis. 433.

Unless there is a direct assumption of the risk or damage by lightning, the company is not liable where a house is only rent and torn to pieces by lightning, without being ignited or any actual combustion taking place.

Babcock v. Montgomery County Mut. Ins. Co., 6 Barb. 637; 4 N. Y. 326.

Kenniston v. Merrimac County Mut. Ins. Co., 14 N. H. 341.

If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease.

No provision in the policy has caused more bitter contention between the company and the insured than has this one. In every case where a building or a part thereof has fallen, the

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Lines 34 to 37.

insured has claimed that the fall was caused by fire. The words in this provision, "or any part thereof," were not formerly in the policy. In the absence of these words the court held that, if a substantial part of the building remained after a fall or a part thereof, the building had not "fallen" within the meaning of the policy.

Firemen's Ins. Co. v. Sholom, 80 Ill. 558.
Lewis v. Springfield F. and M. Ins. Co. (Mass.), 10 Gray 159.
Breuner v. Liverpool and L. and G. Ins. Co., 51 Cal. 101.
Security Ins. Co. v. Mette, 27 Ill. App. 324.

Under the provision of the standard form of policy, all liability for loss on account of fire ceased immediately upon the fall of any part of the building, but the burden of proving that the building or a part thereof fell before any fire ensued is upon the company.

Western Assur. Co. v. J. H. Mohlman Co., 83 Fed. 811.
Transatlantic Fire Ins. Co. v. Bomberger (Ky.), 18 Ins. L. J. 625.

The latest case on this subject is Eppens, Smith & Wieman Co. v. Hartford Fire Ins. Co., 90 N. Y. Supp. 1035.

In this case there was an explosion in a building near by which caused the walls of the insured building to be shattered and weakened, though they did not fall. A fire ensued which, by reason of the weakened condition of the walls from the explosion, caused the insured building to fall more readily. The court held that the company was liable because there had been no actual falling of any part of the building preceding the fire.

This company shall not be liable for loss to accounts, bills, currency, deeds, evidences of debt, money, notes or securities; nor, unless liability is specifically assumed hereon, for loss to awnings, bullion, casts, curiosities, drawings, dies, implements, jewels, manuscripts, medals, models, patterns, pictures, scientific apparatus, signs, store or office furniture or fixtures, sculpture, tools.

Care should be taken in the preparation of the written or printed form to be attached to the policy that each of the above items be specifically mentioned, where it is the intention of the insured to have them covered by the policy. The printed dwelling house form now in general use by the agents gives full protection to the insured as to such of the above items as pertain to the furniture of a dwelling. Few of the forms intended for stores and factories, however, that have come under my observation, give the insured undoubted protection as to these items.

In Lovewell v. Westchester Ins. Co., 124 Mass. 418, the court held that wooden patterns which from their size and shape admit of being applied and managed by the hands of one man, are "tools" within the meaning of the written or printed form covering tools.

In Thurston v. Union Ins. Co. et al., 17 Fed. 127; 12 Ins. L. J. 699, the court held that the words "store fixtures" mean store

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Lines 36 to 41.

fittings or fixed furniture peculiarly adapted to make a room a store, rather than something else; that they do not include partitions, doors, windows, elevator machinery, steam heating apparatus, gas pipes and speaking tubes, but do include a wooden tank, gas fixtures, shelving, counters and basins.

In Commercial Fire Ins. Co. v. Allen, 80 Ala. 571; 16 Ins. L. J. 641, the court held that a wooden shed or awning in front of the building, supported on pillars sunk in the ground, with rafter extending into the walls of the building, was a part of the building and was covered by the policy without being specifically mention; but that the shelving and an office enclosed with railing in one corner of the interior of the building were "store fixtures" within the meaning of the exception in the policy.

Property held on storage or for repairs.

In Home Ins. Co. v. Gwathmey et al., 82 Va. 923; 15 Ins. L. J. 338, the policy covered goods of the insured "either owned or held by them in trust or on consignment," and promised to make good to the insured all loss or damage not exceeding "the interest of the insured in the property." The policy contained the above provision that goods held on storage should not be covered unless specifically mentioned. The goods on storage were specifically insured by the owners thereof. The court held that the policy of the Home Insurance Company did not cover goods held on storage and that it was not liable to contribute with the other policies on such goods.

Furniture and other goods stored in the building (in this case a hotel) to be used or consumed in the business are not goods held on storage within the meaning of the policy.

Continental Ins. Co. v. Pruitt, 61 Tex. 125.

Beyond the actual value destroyed by fire, for loss occasioned by ordinance or law regulating construction or repair of buildings.

On those policies not containing the above provision, the company is liable for a total loss in those cases where a building is damaged to such an extent as to come within the law or ordinance forbidding its repair.

Hamburg-Bremen Fire Ins. Co. v. Garlington, 66 Tex. 103.
Larkin v. Glens Falls Ins. Co. (Minn.), 29 Ins. L. J. 833.
Brady v. Ins. Co., 11 Mich. 445.
Monteleone v. Ins. Co., 47 La. Ann 1563.
Fire Ass'n v. Rosenthal, 108 Pa. St. 474.

These authorities lay down the rule that such ordinances are a part of the contract of insurance, and that the insurance company is bound thereby. The company is entitled to what remains of the building or to have the value of what remains deducted from the recovery. The rule announced in the above cases would not apply in case of a loss where the above provision appears in the policy. The object of the insertion of this provision in the New York standard form of policy (and the same

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provision is found in nearly all of the other standard forms of policies) was to avoid the rule announced in these cases.

Or by interruption of business, manufacturing processes or otherwise; nor for any greater proportion of the value of plate glass, frescoes and decorations than that which the policy shall bear to the whole insurance on the building described.

The first part of this clause—to-wit: "By interruption of business, manufacturing processes or otherwise"—relates to consequential losses, and separate policies are used against this risk. This entire provision is wholly ambiguous, and no cases are reported where the company has been held liable contrary to its terms.

If an application, survey, plan or description of property be referred to in this policy, it shall be a part of this contract and a warranty by the insured.

The effect of this provision is to make the statements in any application, survey or plan a warranty, and also the description of the risk in the written or printed form a warranty. The difference between a warranty and representation is that the things warranted must be strictly true and that their materiality or immateriality are not open to question. While a representation need be only substantially true, and if the misrepresentation concerns a matter not material to the risk, the contract is not affected thereby.

As said in Wetherill v. Maine Ins. Co., 49 Me. 200: "Warranties in a policy of insurance or in the application, when made a part of the policy, must be fully kept and performed, without reference to the question whether they are material to the risk or not."

As the business of fire insurance is at present conducted, an application is rarely taken for the policy, and the cases construing this provision nearly all arise on a question of misdescription of the risk and its occupancy in the written or printed form.

The following are a few of the cases construing this provision which are applicable to the present mode of conducting the business:

Aurora Fire Ins. Co. v. Eddy, 49 Ill. 106, where the insured agreed to keep eight buckets filled with water on the first floor and four in the basement. The court held that the insured was bound to show that the required number of buckets, in serviceable condition, were at the designated places, ready for instant use.

Sarsfield v. Metropolitan Ins. Co. (N. Y.), 61 Barb. 479, where the building was described as a "dwelling house" and part of it was used as a billiard room and part as a restaurant. The court held that there was a breach of warranty, avoiding the policy.

Baker v. German Fire Ins. Co., 124 Ind. 419, where the building was described as "occupied as a hotel, with bar and billiard room attached," and the evidence showed that the building was occupied as a saloon. The court held the company not liable.

McKenzie v. Scottish Union and National Ins. Co., 112 Cal.

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548, where the insured agreed to keep a watchman, and failed to do so at all times.

Scottish Union and National Ins. Co. v. Stubbs, 98 Ga. 754, where the insured agreed to keep books and inventories in an iron safe, and failed to do so.

Home Ins. Co. v. Cary, 9 Tex. C. A. 300.

American Fire Ins. Co. v. Center (Tex.), 33 S. W. 554, where the court held that the agreement to keep books and inventories in an iron safe was a warranty.

It is held, however, that the description of the occupancy of the insured premises is not a continuing warranty, but if true at the time the policy is issued, change of occupancy thereafter without an increase of the risk is not a breach of the warranty and does not avoid the policy.

Joyce v. Maine Ins. Co., 45 Me. 168.

Cumberland Land Valley Co. v. Douglas, 58 Pa. St. 419.

Somerset County Mut. Fire Ins. Co. v. Usaw, 112 Pa. St. 80.

In the case of King Brick Manufacturing Co. v. Phœnix Ins. Co., 154 Mass. 291, the court held that this provision of the policy refers to some paper outside of the policy, and does not constitute words within the policy a warranty.

To even collect and cite the cases concerning warranties, without any reference as to what each case concerns, would require more than an hour's time to read their titles. The cases above cited will be sufficient, I believe, to inform you as to the general rule announced by the courts in construing this provision of the policy, which is all that is intended to be done by this series of lectures.

Many of the States have a statutory provision against warwaranties, and providing that a misrepresentation or breach of warranty must be as to a matter material to the risk in order to avoid the policy. Such is the provision in California, Georgia, Iowa, Kentucky, Maine, Massachusetts, New Hampshire, North Dakota, Oklahoma, South Dakota.

In any matter relating to this insurance, no person, unless duly authorized, in writing, shall be deemed the agent of this company.

The question of agency is entirely one of fact, and the company can not by any provision make its agent the agent of the insured.

See annotation, collecting all cases to that date, in 20 L. R. A. 277.

Gans v. St. Paul Ins. Co., 43 Wis. 108.

Eilenberger v. Protective Mut. Ins. Co., 89 Pa. 464.

Whited v. Germania Fire Ins. Co., 76 N. Y. 415.

Sullivan v. Phœnix Ins. Co., 34 Kans. 170.

North B. and M. Ins. Co. v. Crutchfield, 108 Ind. 518.

Where a broker acting on behalf of the insured procures the insurance for him, such broker is the agent of the insured.

Wilber v Williamsburgh City Fire Ins. Co., 122 N. Y. 439.

Lines 45 to 48.

A broker may, however, be the agent of the company. It depends on who pays him for his services. If the company allows a broker a commission on all business brought to it by him, then in all such transactions the broker is the agent of the company. Nearly all the States regulate the question of agency by statute. The statute of Illinois is as follows:

"The term 'agent' or 'agents' used in this section shall include an acknowledged agent, surveyor, broker or any other person or persons who shall in any manner aid in transacting the insurance business of any insurance company not incorporated by the laws of this State."

The provision, therefore, that "no person, unless duly authorized, in writing," shall be deemed an agent, may be construed as a nullity.

This is the only provision of the policy to which the courts have refused recognition according to its terms.

This policy may by a renewal be continued under the original stipulations in consideration of premuim for the renewed term, provided that any increase of hazard must be made known to this company at the time of renewal, or this policy shall be void.

The effect of a renewal receipt under this provision is to revive the contract and continue it in force for another term. If a loss occurs within the new term, a recovery can only be had under the terms and conditions of the original contract.

New England Fire and M. Ins. Co. v. Wetmore, 32 Ill. 221.
Pitney v. Glens Falls Ins. Co. 65 N. Y. 6.
Aurora Fire Ins. Co. v. Kranich, 36 Mich. 289.
Hay v. Star Fire Ins. Co., 77 N. Y. 235.

A verbal agreement to renew the policy, and the receipt of premium in the same amount which was paid on the original policy, establishes a valid contract; and the law presumes such renewal to be for one year.

Scott v. Home Ins. Co., 53 Wis. 238; 11 Ins. L. J. 177.

The mere promise by the company's agent to renew, the premium being neither paid nor tendered, can not be regarded as a contract of renewal.

Croghan v. Underwriters' Agency, 53 Ga. 109.

A contract to renew can not be established by a mere negotiation; the minds of the parties must have met upon terms well understood by each of them.

King v. Hekla Fire Ins. Co., 58 Wis. 508; 13 Ins. L. J. 146.
O'Reilly v. London Assur. Corporation, 101 N. Y. 575; 15 Ins. L. J. 830.

In the case of Hartford Fire Ins. Co. v. Walsh, 54 Ill. 164, the court held that the renewal of a policy is in effect a new contract on the same terms and conditions as in the original policy; and a clause in the policy, requiring notice and consent in case of vacancy of the premises for over thirty days, is still in force under the renewal; and a verbal consent by the agent under the policy itself can not operate as a consent under the new contract,

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Lines 47 to 50.

for the latter does not differ from a new policy under a new application.

A notice of increase of hazard subsequent to the issuance of the original policy and before the renewal need not be in writing. The stipulation for notice is satisfied by an oral communication to the company or its agent.

Liddle v Market Fire Ins. Co., 29 N. Y. 184.

The failure of the insured to give any notice of an increase of the risk on renewal of the policy has the effect to avoid the renewal, and there can be no recovery.

Peoria Sugar Refinery v. People's Fire Ins. Co., 15 Ins. L. J. 52.

Cole v. Germania Fire Ins. Co., 99 N. Y. 36; 14 Ins. L. J. 453.

The same care should be exercised upon the renewal of a policy, to ascertain the condition of the risk and other matters pertaining thereto, which is or should be exercised in issuing an original policy. It is neither fair to the company nor to the insured, to issue a renewal without taking some action to ascertain if there has been any change in the condition of the original risk.

This policy shall be canceled at any time at the request of the insured; or by the company by giving five days' notice of such cancellation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate; except that when this policy is canceled by this company by giving notice, it shall retain only the pro rate premium.

The proper construction of this section of the policy has been many times before the courts, and while there is a seeming conflict in the decisions, a careful reading of them will show perfect harmony in the minds of the courts as to what constitutes a legal cancellation of the policy. The facts in each individual case must necessarily vary from the facts in other cases, and it is this variance in the facts that makes a seeming conflict in the decisions.

The provision for cancellation must be strictly followed, unless insured has waived his right to insist upon the five days' notice for cancellation. The insured may, of course, waive the five days' notice, provided for in the policy, and accept immediate notice of cancellation. It will not be my purpose to discuss what will constitute a waiver of the five days' notice by the insured, but will treat the question as though there had been no such waiver.

Where there has been no waiver of the five days' notice, the cancellation does not become effectual until the five days have expired.

Healy et al. v. Ins. Co. of the State of Pennsylvania, 63 N. Y. Supp. 1055.

Lines 49 to 55.

In that case the agent served notice on the insured, September 19, to the effect that the company desired to cancel the policy. On November 3 the agent wrote that the policy "has been marked off the books of this company. * * * Kindly return the policy to this office." The fire occurred November 7. The court held that the letter of September 19 was not a notice of cancellation, but that such notice dated from the sending of the letter of November 3, and that the fire having occurred within five days of that date, the company was liable.

There is seeming conflict in the authorities as to whether it is necessary to tender the unearned premium to the insured at the time the notice of cancellation is given. The determination of this question depends upon the wording of the policy. Under the provisions of the New York standard form—to-wit: "The unearned portion shall be returned on surrender of this policy," the New York Supreme Court has held that such tender is not necessary, and that the unearned portion of the premium need not be returned until the policy is surrendered.

Backus et al. v. Exchange Fire Ins. Co., 49 N. Y. Supp. 677.

In that case the company notified the insured of cancellation of the policy, and that "the pro rata unearned premium thereon will be paid upon proper demand and surrender of policy." The insured claimed that the policy had not been canceled according to law, for the reason that the unearned premium had not been returned or tendered to him, relying upon the Tisdell case, in the New York Court of Appeals. The court, in passing on this question, says:

"No demand was made upon the insurance company for this premium, nor was the policy or last renewal ever surrendered, nor did the company make any further tender of the unearned premium mentioned in this letter. No point is made by the appellants of the sufficiency of this notice to cancel the policy, or of the sufficiency of this letter as a notice that the defendant intended to exercise its option that the policy should be canceled. The only claim made is that an actual or a formal tender of the unearned premium was essential to the cancellation of the policy by the company. The clause in the policy provides that it may be canceled at any time by the company giving five days' notice of such cancellation. This notice by the company to the plaintiffs did give five days' notice of the cancellation, and, under the provisions of the policy, by such notice the policy was canceled. The further provision that the unearned portion of the premium should be returned on surrender of the policy or last renewal did not require the repayment of the unearned premium as a condition precedent to the cancellation of the policy. The pro rata premium was only returned on surrender of the policy or last renewal. That surrender of the policy was an act to be performed by the insured. It can not be enforced by the insurance company, as it is in the possession of the insured. All that the defendant could do was to notify the insured that the policy was canceled and offer to pay the pro rata unearned premium upon the surrender of the policy. It then became the duty of the insured to offer to surrender the policy or last renewal, and then the obligation of the insurance company to pay the pro rata premium would arise. If a surrender of the policy had been tendered by the insured and the insurance company had then refused to pay the pro rata unearned premium, it might be that the obligation of the company under the policy would revive and the policy continue in force; but, under the form of this clause providing for the cancellation, it seems to me quite clear that the policy was canceled by a service of the notice, with an offer then to return the pro rata unearned premium upon the surrender of the policy.

Lines 51 to 55.

"The case of Walthear v. Insurance Co., 2 App. Div. 330, 37 N. Y. Supp. 857, is in point, and the reason given by the court in that case to show that the case of Nitch v. Insurance Co., 83 Hun. 614; 31 N. Y. Supp. 1131, affirmed by the Court of Appeals in 152 N. Y. 635; 40 N. E. 1149, is distinguishable, applies as well to this case as to the Walthear case. In the latter cause the court says: 'The distinction therefore, between this case and the Nitch case, will be found in the fact which we have averted to—that there was in that case no return or offer to return the premium, while in this case there was a distinct offer.'

"In the case at bar it will be noticed that there was a distinct offer to repay the pro rata unearned premium upon demand and surrender of the policy, and this case is therefore brought directly within the decision of the Walthear case."

In an earlier case in the New York Court of Appeals, the court says:

"The question presented is no longer an open one in this court. It was so decided in the case of Nitch v. Ins. Co. (152 N. Y. 635) and affirmed in this court, without an opinion. * * * It being the law, as we have observed, that, in addition to the notice of cancellation there must be a return or tender of the unearned premiums in order to effectuate a cancellation of the policy. * * * It was necessary for the defendant, under its contract of insurance with the plaintiff, either to refund or tender the unearned premium, in addition to giving a notice of cancellation in order to terminate the policy. * * * The company was bound to seek him out and tender to him the whole amount due."

Tisdell v. New Hampshire F. Ins. Co., 155 N. Y. 163; 27 Ins. L. J. 395.

The New York Court of Appeals, in the case of Crown Point Iron Co. v. Ætna Ins. Co., 127 N. Y. 609; 21 Ins. L. J. 31, seeks to distinguish these cases where the insured requests cancellation from those where the company gives notice of cancellation, and there holds that, in case the insured demands cancellation of the policy and returns the policy to the agent to be canceled, the return of the premium or tender thereof to the insured is not a condition precedent to the termination of the contract, but that the contract is at an end from the moment when the demand of the insured for cancellation reaches the agent. I must confess that I am unable to follow the court in its argument and am unable to see the distinction pointed out, or attempted to be pointed out by the court.

For further cases under this subdivision, see:

Hopkins v. Phœnix Ins. Co., 78 Ia. 344; 43 N. W. 197.
Curly v. Phœnix Ins. Co., 13 Lea 340.
Bingham v. North America Ins. Co., 774 Wis. 498.
Walthear v. Pennsylvania F. Ins. Co., 2 Hun's App. 228.
Phœnix Ins. Co. v. Brecheisen, 50 Ohio St. 542; 53 N. E. 53.

Where a policy has been issued and delivered by an agent without the requirement of the payment of the premium in advance, the company may cancel the policy by giving the required notice, and in such case the company will not be required to return any part of the premium to the insured, notwithstanding the fact that the agent may have charged himself with the amount of the premium in his account with the company.

Burgson v. Builders' Ins. Co., 38 Cal. 541.
Boatmen's F. and M. Ins. Co. v. James, 10 Ky. L. R. 816.

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Van Wert v. St. Paul F. and M. Ins. Co., 36 N. Y. Supp. 54; 40 N. Y. Supp. 463.
Farnum v. Phœnix Ins. Co., 83 Cal. 246; 23 Pac. 869.
Atone v. Franklin Ins. Co., 105 N. Y. 543; 16 Ins. L. J. 660.

In a case arising in Ohio, the premium was paid by the execution of a note by the insured to the company. The insured having failed to pay the note at maturity, the company notified him of its option to cancel the policy. The insured claimed that the cancellation was not complete, for the reason that a ratable proportion of the premium had not been returned to him or credited upon the note. In passing on this question, the court says:

"In case the premium had been actually paid for the year, the pro rata share thereof from September 9 to the end of the year must have been tendered back before this option could have been exercised. In the present case no money had been actually paid. * * * On this state of facts the court, in effect, charged: that it was not necessary to tender back the cash for the unearned premium, nor was the right to cancel defeated by a failure to credit the exact amount or, indeed, any amount. In this we concur. The effect of taking the note was to give the policy life, notwithstanding the fifth condition; but it did not divest the company of its right reserved in the sixth condition, to terminate the insurance at any time on giving notice, and in case the premium had been paid, tendering back the unearned proportion thereof. As nothing had been paid, nothing was to be tendered back. The only duty imposed on the company when the premium had not been paid was to give notice in a reasonable time before the fire."

Little v. Eureka F. and M. Ins. Co., 38 Ohio St. 110; 11 Ins. L. J. 417.

In a case arising in the United States Circuit Court, Southern District New York, the policy procured by N. and made payable to J., mortgagees, the mortgagee having become owner of the property, had the policy affirmed and made payable to C., as mortgagee. The premium on the policy had not been settled by N. giving a note; and, not being paid at maturity, N. and J. were notified by the company that the policy had been canceled. No notice was given to C. The court, in its opinion, says:

"It is further to be noticed that, by the terms of this policy, it could be terminated on giving notice to that effect, but the premium was to be refunded only on surrender of the policy. These notices were sent by mail, and the plaintiff and the Jennings Lumber Drying Company had no opportunity to surrender the policy and have an adjustment of the premium without seeking out the defendant for that purpose. No premium had been actually paid, but the defendant had the obligation of others for it, which had been accepted in lieu of it. The right to cancel depends on pursuing very strictly the course described, which includes the refunding of the premium without requiring anything from the assured. This is shown by the cases cited by the defendant's counsel, before referred to. If the note of the assured is taken for the premium, it must be refunded, the same as if money had been paid, in order to terminate the risk. Wood Fire Ins. Co., Sec. 106. The defendant did not surrender the obligation of Nye & Co., held for the premium, either to Nye & Co. or the Jennings Lumber Drying Company, or the plaintiff; but holds that obligation still. On principle it would seem that the surrender of that was a part of what was required to be done to effect a termination of the risk."

Chadbourne v. German-American Ins. Co., 31 Fed. 533.

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In a case arising in New York, policies had been issued to a corporation, on a lot of charcoal. After the policies had been issued, the stock of charcoal being greatly reduced, the general manager of the corporation instructed the assistant manager to cancel some of the policies, and if he could procure a return of the unearned premium pro rata, to cancel them all; but in any event to cancel some. Thereupon the assistant general manager wrote to the agent, enclosing the policies, with request to be allowed the pro rata premium, and that the matter be attended to at once. The policies were received by the agent and were laid aside, together with the letter requesting cancellation, to be answered in its turn. About two hours later he received a telegram to return the policies, and at once mailed the policies back. In the meantime the charcoal had been destroyed by fire. Of this the agent had no knowledge when he returned the policies. In holding that the company was not liable on the policies, for the reason that the same had been canceled, the court says:

"When the insured surrenders the policy and requests that it be canceled, he can do no more. Unless that ends the contract, he is powerless to end it, and the company, while able itself to hang on or let go, as it wishes, can hold him against his will. An insolvent insurer, by refusing to cancel, would prevent the insured from procuring other insurance. The right of action for the unearned premium would not be complete without the assent of the insured, and that, in effect, would be a new agreement. It was not necessary, as we think, that there should be any action on the part of the company. No formal cancellation or physical defacement of the policy was required, because, by virtue of the contract and the statute, the surrender of a policy with a request that it be terminated operated as a cancellation, even if the insurer absolutely refuses to permit it to be canceled."

In Train v. Holland, Pur. Ins. Co., 62 N. Y. 598; 68 N. Y. 208, it was held that a surrender of a policy by the insured and the acceptance of it by the authorized agent of the insurer, with the intention on the part of both that it should no longer be a contract, was, in effect, a cancellation of it. In that case, which arose prior to the passage of the statute, it did not appear on either occasion when it was before this court, as an examination of both appeal-books shows, that the policy surrendered contained any provision upon the subject of surrender or cancellation. Hence the decision proceeded upon the theory of a new arrangement involving a meeting of minds, but even then nothing was required to be done by the company to terminate the contract. See also Atlantic Ins. Co. v. Goodall, 35 N. H. 328; 336; Walters v. St. Joseph F. Ins. Co., 39 Wis. 489.

For other cases under this subdivision, see:

Farmers' Mut. Ins. Co. v. Phœnix Ins. Co. (Neb.), 90 N. W. 1000.
Train v. Holland Purchase Ins. Co., 62 N. Y. 598.
Walters v. St. Joseph F. Ins. Co., 39 Wis. 489.
German Ins. Co. v. Davis, 12 S. W. 155.
Ins. Comm'r v. People's F. Ins. Co., 68 N. H. 51.
Commonwealth v. Massachusetts F. Ins. Co., 119 Mass. 45.
Sea Ins. Co. v. Johnson et al., 44 C. C. A. 477; 105 Fed. 286.
Phœnix Ins. Co. v. Brecheisen, 35 N. E. 33; 50 Ohio St. 542.

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Where the insured is notified to return policies which have been issued to him, with statement that such policies are to be canceled and the insurance rewritten in other companies, and the insured returns the policies for such purpose, the cancellation is not complete until the insurance is rewritten and policies issued by some other company.

Poor v. Hudson Ins. Co., 2 Fed. 432.
Caldwell v. Stadacona Ins. Co., 11 Duvall 212.

Where the insured entrusted the placing of his insurance with a broker, giving the broker full charge in the matter to select the companies and renew the policies when necessary, such broker has authority to surrender a policy for cancellation and to adopt insurance in another company in lieu thereof. In a case arising in Michigan, the insured had, for several years previous to the time of issuing the policy sued on, placed his insurance with M., and had given M. authority to keep his property insured in such companies as he might select, and to renew the policies whenever necessary for that purpose. M. insured the property in the S. company, entered the same on his books of that company, and sent the policy to insured. He also reported the policy to the company and advanced the premium thereon. Thereafter the S. company notified M. to cancel the policy, which he did in the usual way, and notified insured of the fact, and also that he had put the insurance in another company. The agent, as soon as he canceled the S. policy, placed the risk in the N. company, issuing the policy in suit, and placed it in his safe for the insured, entered it on his daily register and reported it to the N. company, with the premium. The fire occurred the next day. The N. company claimed that M. had no authority to cancel the policy in the S. company. The court says:

"Under the arrangement with the agent as stated by himself, the consent of the plaintiff to a cancellation of the policy was not necessary. The selection of the companies in which plaintiff was to have his property kept insured was placed at the discretion of the agent. The plaintiff's knowledge, or want of knowledge, upon that subject could not affect the issue in this case under the contract the plaintiff claims to have had with the agent. While Marsh could not act for both parties in making the contract of insurance, or upon any other matters relating to the business requiring the concurrence of both parties, he could act as the custodian of the policy which was issued for the plaintiff until he should call for it. This was a matter in which the company had no interest and over which it had no control whatever, and, when the agent received it for the plaintiff for that purpose, it was clearly a delivery by the company. From the day the agent received the order for the insurance until the property burned, he had the direction of the plaintiff to issue the policy, and after it was issued and delivered neither party could modify or cancel the contract without some special authority so to do from the other."

Dibble v. Northern Assur. Co., 70 Mich. 1; 17 Ins. L. J. 540.
For other cases under this subdivision, see:
Parker, etc., Co. v. Exchange F. Ins. Co., 166 Mass. 484.
Buick v. Mechanics Ins. Co., 103 Mich. 75; 61 N. W. 337.
Huggins, etc., Co. v. People's Ins. Co., 41 Mo. App. 530.
Von Wein v. Scottish Union and Nat'l Ins. Co., 118 N. Y. 94; 23 N. E. 123.

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Faulkner v. Manchester F. Assur. Co., 171 Mass. 349.
Arnfeld v. Guardian Assur. Co., 172 Pa. St. 605.
Schauer v. Queen Ins. Co., 88 Wis. 561; 60 N. W. 994.
Royal Ins. Co. v. Wight, 55 Fed. 455.
White v. Ins. Co., 93 Fed. 161.
Kooistra v. Rockford Ins. Co., 81 N. W. 568.

In a case arising in New York, the policy had been procured for the insured by a broker who had acted as agent for the insured, for about two years, in procuring insurance upon its property from the various companies. The rates of premium, the amount to be insured by any particular company and the company being left to his discretion. The policy in suit remained in the possession of the broker until after the fire. The company served notice of cancellation upon the broker, and, on the afternoon of the day of the fire, one of its agents called upon the president and general manager of the insured and informed him that the policy was canceled, and thereupon the policy was surrendered to him as a canceled policy. The court says:

"Certainly so long as Frank held the policy and it was carried upon his credit and not delivered to or accepted by the insured, notice of cancellation could be given to him. And upon receipt of such notice it would be his duty as a broker to procure other insurance."

Stone v. Franklin Ins. Co., 105 N. Y. 543; 16 Ins. L. J. 660.

In a later case in the same court, a binding slip was issued upon an application received from a broker. The policy issued by the company provided that it might be canceled "on giving notice to that effect to the assured or to the person who may have procured this insurance to be taken by this company." Notice of cancellation was served upon the broker about two hours before the time of the fire. In holding that the notice was sufficient to terminate the insurance, the court says:

"We think there can be no reasonable doubt upon the language of the condition that notice to the brokers was a good notice, and that, if otherwise sufficient, it terminated the defendant's liability. The brokers procured the insurance. In fact, their duties in respect to it had not terminated. The binding slip provided that the policy when issued should be delivered at their office. The notice was given to persons to whom notice might be given by the express language of the policy. The special language of the condition in the defendant's policy upon this point was, it is said, inserted to meet the objection pointed out by this court in Hermann v. Insurance Co., 100 N. Y. 415."

For other cases under this subdivision, see:
Parker & Young Mfg. Co. v. Exchange F. Ins. Co. et al. (Mass.), 44 N. E. Rep. 614.
Armour v. Transatlantic Ins. Co., 90 N. Y. 450.
Karelsen v. Sun Fire Office, 122 N. Y. 545.
Mississippi Valley Mfrs. Mut. Ins. Co. v. Burmond, 45 Ill. App. 22.

It would appear from a study of the cases under this heading that notice of cancellation served upon a broker is binding upon the insured only in those cases where (1) the policy remains in the hands of the broker, undelivered; or (2) where

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the insured, after knowledge of the fact that notice of cancellation had been served upon the broker, makes no objection thereto or accepts the benefit of other insurance to take the place of the canceled policy; or (3) delivers the policies to the broker, to be returned.

In a case in the United States Supreme Court, notice of cancellation was served upon the broker who procured the insurance. The company claimed that such notice was sufficient to cancel the policy under the following provision: "It is a part of this contract that any person, other than the assured, who may have procured the insurance to be taken by this company, shall be deemed to be the agent of the assured named in this policy, and not of this company under any circumstances whatever, or in any transactions relating to this insurance." The lower court held with the company, that notice to the broker of the cancellation was binding upon the insured. The Supreme Court, in reversing the case, says:

"We do not concur in this interpretation of the contract. The words in their natural and ordinary signification import nothing more than that the person obtaining the insurance was to be deemed the agent of the insured in all matters immediately connected with the procurement of the policy. Representations by that person in procuring the policy were to be regarded as made by him in the capacity of agent of the insured. His knowledge or information, pending negotiations for insurance, touching the subject matter of the contract, was to be deemed the knowledge or information of the insured. When the contract was consummated by the delivery of the policy, he ceased to be the agent of the insured, if his employment was solely to procure the insurance. What the company meant by the clause in question, so far as it relates to the agency, for the one party or the other, of the person procuring the insurance, was to exclude the possibility of such person being regarded as its agent, 'under any circumstances whatever, or in any transaction relating to this insurance.' This, we think, is not only the proper interpretation of the contract, but the only one at all consistent with the intention of the parties as gathered from the words used. There is, in our opinion, no room for a different interpretation. If the construction were doubtful, then the case would be one for the application of the familiar rule that the words of an instrument are to be taken most strongly against the party employing them, and, therefore, in cases like this, most favorably to the insured. The words are those of the company, not of the assured. If their meaning be obscure, it is the fault of the company. If its purpose was to make notice to the person procuring the insurance of the termination of the policy equivalent to notice to the insured, a form of expression should have been adopted which would clearly convey that idea, and thus prevent either party from being caught or misled.

"As the uncontradicted evidence was that Anthony's agency or employment extended only to the procurement of the insurance, the jury should have instructed that his agency ceased when the policy was executed, and that notice to him, subsequently, of its termination was ineffectual to work a rescission of the contract."

Grace et al. v. American Cent. Ins. Co., 109 U. S. 278; 13 Ins. L. J. 127.

In this case (Grace v. American Cent. Ins. Co.) it was further claimed that the insured was bound by the notice of cancellation served upon the broker, by reason of a custom which existed between the agents and the brokers to so cancel policies issued in that locality. The trial court admitted evidence

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of such custom. In holding this to be error, the Supreme Court of the United States further says:

"At the trial below evidence was offered by the company and was permitted over the objection of the plaintiffs to go to the jury, to the effect that when this contract was made there existed in the cities of New York and Brooklyn an established, well-known general custom in fire insurance business, which authorized an insurance company, entitled upon notice to terminate its policy, to give such notice to the broker by or through whom the insurance was procured. This evidence was inadmissible because it contradicted the manifest intention of the parties as indicated by the policy. The objection to its introduction should have been sustained. The contract, as we have seen, did not authorize the company to cancel it upon notice merely to the party procuring the insurance—his agency, according to the evidence, not extending beyond the consummation of the contract. The contract, by necessary implication, required notice to be given to the insured, or to some one who was his agent to receive such notice. An express written contract, embodying in clear and positive terms the intention of the parties, can not be varied by evidence of usage or custom. In Barnard v. Kellog, 10 Wall. 383, this court quotes with approval the language of Lord Lyndhurt in Blackett v. Royal Exchange Assur. Co., 2 Cromp. & Jervis 249, that 'usage may be admissible to explain what is doubtful· it is never admissible to contradict what is plain.' This rule is based upon the theory that the parties, if aware of any usage or custom relating to the subject matter of their negotiation, have so expressed their intention as to take the contract out of the operation of any rules established by mere usage or custom. Whatever apparent conflict exists in the adjudged cases as to the office of custom or usage in the interpretation of contracts, the established doctrine of this court is as we have stated. Partridge v. Ins. Co., 15 ib., 573; Robinson v. U. S., 13 ib., 365; The Delaware, 14 ib., 603; Nat. Bank v. Burkhardt, 100 ib., 692."

In a case arising in Virginia, the company claimed the right to serve notice of cancellation upon the broker, by reason of a custom which existed in the city of Richmond among insurance companies, brokers and agents doing business in that city, that, whenever insurance policies were obtained through insurance brokers, all notices as to the renewal and cancellation of the same were required to be given not to the assured, but to the broker through whom the insurance was effected. The trial court instructed the jury in harmony with this contention of the company. The Supreme Court of Appeals, after holding that the agency of the broker ceased when he had procured the insurance and turned the policies over to the insured, in passing on the question of custom, says:

"This, then, being the well-settled and conceded law on this subject, it was sought to sustain the notice in this case upon the ground that the local custom in Richmond was to notify the broker, etc.; and the Circuit Court so instructed the jury. But this instruction violates the plainest principles of construction as set forth above. The policy required notice to be given of the desire to cancel to the assured; and the question, therefore, is whether the broker was the agent of the assured for this purpose. The question is not what the local custom of Richmond is as to this notice, but what is the contract on the subject between the parties. The evidence is clear, and it is admitted, that these brokers were not otherwise agents of the insured, in this case, except to procure the insurance. If, therefore, the insurers did not give notice as required by the contract, it is immaterial whether they gave notice accordingly to the custom or not. This question is perhaps as well settled upon authority as the others."

* * * * * * *

"Upon reason, as well as upon authority, it is clear that under the contract in this case the notice of a desire to cancel the same was

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to be given to the assured. It was the express stipulation in the policy itself, 'to the assured'. The notice was not given to the assured, nor to a person authorized to receive notice for the company. Notice was neither given to the assured nor to any agent of the assured, and it follows that there was no notice of a desire for cancellation before the loss occurred. The assured in this case was another insurance company, but the principle is the same as when an individual is the assured. We think the Circuit Court of Richmond erred in instructing the jury as we have seen on the question of notice of cancellation; that it should have instructed the jury in this case that no notice of cancellation was given to the company by giving such notice to a broker not authorized to receive it."

Mutual Assur. Soc. v. Scottish Union and Nat'l Ins. Co., 84 Va. 116; 17 Ins. L. J. 819.

For further cases under this subdivision, see:

North America Ins. Co. v. Forcheimer, 86 Ala. 541; 19 Ins. L. J. 997.

Rothschild v. American Cent. Ins. Co., 74 Mo. 41; 11 Ins. L. J. 282.

Broadwater v. Lion Ins. Co., 34 Minn. 465; 15 Ins. L. J. 295.

Body v. Hartford Ins. Co., 63 Wis. 157.

Wilson v. New Hampshire Ins. Co., 140 Mass. 210; 16 Ins. L. J. 408.

Herman v. Ins. Co., 100 N. Y. 411; 3 N. E. 341.

Ins. Co. of North America v. Forcheimer, 86 Ala. 546; 5 S. 870.

Ins. Cos. v. Raden, 87 Ala. 311; 5 S. 876.

Quong Tue Sing v. Anglo Nevada Ins. Co., 86 Cal. 566; 25 Pac. 58.

VanValkenburg v. Lennox F. Ins. Co., 51 N. Y. 465.

Adams v. Mfr. and Builders' Ins. Co., 17 Fed. 630.

Hodge v. Security Ins. Co., 33 Hun. 583.

Mutual Assur. Soc. v. Scottish Union and Nat'l Ins. Co., 84 Va. 116.

East Texas F. Ins. Co. v. Bloom, 76 Tex. 653.

Johnson v. N. B. and M. Ins. Co. (Ohio), 63 N. E. 610.

Martin v. Palatine Ins. Co. (Tenn.), 61 S. W. 1024.

In a case arising in Missouri a policy was issued to a mortgagor, with loss payable to his mortgagee. The mortgagee clause attached to the policy provided that the policy might be canceled upon notice to the mortgagees. Such notice was served upon the mortgagee, and he surrendered the policy to the company. The court held that, under the terms of the contract, the mortgagor was not entitled to notice of cancellation, and that the notice to the mortgagee and the surrender of the policy by him canceled the insurance.

Burris v. Phœnix Ins. Co., 65 Mo. App. 167.

In a case arising in Kansas, where a policy was made payable to a mortgagee by having attached thereto the standard mortgagee clause, notice of cancellation was served upon the mortgagor. The mortgagee claimed that under the mortgage clause a notice to the mortgagor was not sufficient to cancel the policy

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as against its rights. The court held that the notice of cancellation served upon the mortgagor was sufficient to terminate the rights of the mortgagor under the policy.

Shawnee F. Ins. Co. v. Bayha et. al., 55 Pac. 474.

For other cases under this subdivision, see:
Matter of Moore, 6 Daily 541.
Marrin v. Stadacona, 43 Upper Cam. Q. B. 56.
Miller v. Southside F. Ins. Co., 87 Pa. 339.
Latlan v. Royal Ins. Co., 16 Vroom 453.

I can add little in conclusion. The quotations from the leading cases have been very full upon each subdivision, and it seems to me that no further or other comment is necessary. As stated in the beginning, there is no real conflict between the courts as to what is necessary to effect a valid cancellation of a fire insurance policy. The terms of the standard fire policy are plain, explicit and unambiguous, and the courts hold the company to a literal compliance therewith. I know it is and has been the custom in all the large cities, where the greater part of insurance is obtained through brokers, or agents acting as brokers, to treat the broker as the agent of the insured, both for the purpose of effecting the insurance and in the cancellation thereof; but, as shown, this custom is not binding upon the insured. He may ratify the action of the broker in canceling the policy, or refuse to ratify such action, as his interest may dictate. If the insured should give the broker a power of attorney to accept notices of cancellations and substitution of policies, then, in such cases, the insured would be bound; but in the absence of the delegation of such power to the broker, the mere employment of a broker to procure insurance would not be a delegation by the insured to such broker of the power to accept notices of cancellation and substitution of policies.

If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended hereto.

Under this provision, where the loss is simply made payable to the mortgagee or other person, "as his interest may appear," the mortgagee or such other person is bound by the acts of the mortgagor which create a forfeiture of the policy.

Continental Ins. Co. v. Hulman, 92 Ill. 145.
Swenson v. Sun Fire Office, 68 Tex. 461.
Baldwin v. Phœnix Ins. Co., 60 N. H. 164.

Where a standard or union mortgagee clause is attached to the policy, the effect of such clause is to create an individual contract with the mortgagee, and the company can not set up any

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defense based upon any act or neglect of the mortgagor, whether committed before or after the issue of the policy.

Hastings v. Westchester Fire Ins. Co., 73 N. Y. 141.
Hartford Fire Ins. Co. v. Olcott, 97 Ill. 439.
Meriden Sav. Bank v. Home Mut. Fire Ins. Co., 50 Conn. 396.
Ormsby et al. v. Phœnix Ins. Co., 58 N. W. 301.
Mutual Fire Ins. Co. v. Alvord, 61 Fed. 752.
Phenix Ins. Co. v. Omaha Loan and Trust Co., 60 N. W. 133.

Under the mortgagee clause, where the company pays the amount of the loss to the mortgagee and the policy is forfeited as to the mortgagor, the company is entitled to be subrogated to the rights of the mortgagee, under the mortgage, to the extent of the payment made on account of the loss.

Ulster County Sav. Inst. v. Decker et al., 74 N. Y. 604.
Lett v. Guardian Fire Ins. Co., 125 N. Y. 82.
Sterling Fire Ins. Co. v. Beffrey et al. (Minn.), 21 Ins. L. J. 274.
Allen v. Watertown Fire Ins. Co., 132 Mass. 480.
Wolcott v. Sprague, 55 Fed. 545.

As a condition of the right of subrogation under the mortgagee clause, payment of the loss must be made to the mortgagee and demand made for the assignment.

Eliot Five Cents Sav. Bank v. Commercial Union Assur. Co., 142 Mass. 142.
Phenix Ins. Co. v. First National Bank, 87 Va. 765.

If the policy is not absolutely forfeited as to the mortgagor, the company is not entitled to assignment of the mortgage on payment of the loss to the mortgagee upon a mere claim of forfeiture as to the mortgagor.

Traders Ins. Co. v. Race, 142 Ill. 338.

For a leading article showing the rights of the mortgagor, mortgagee and of the company under the mortgagee clause, see 2 Am. Law Register & Review (August, 1895), 510.

Other rights and duties of the mortgagee and other payees of the policy will be introduced in their proper places.

If property covered by this policy is so endangered by fire as to require removal to a place of safety, and is so removed, that part of this policy in excess of its proportion of any loss and of the value of property remaining in the original location, shall, for the ensuing five days only, cover the property so removed in the new location; if removed to more than one location, such excess of this policy shall cover therein for such five days in the proportion that the value in any one such new location bears to the value in all such new locations; but this company shall not, in any case of removal, whether to one or more locations, be liable beyond the proportion that the amount hereby insured shall bear to the

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total insurance on the whole property at the time of the fire, whether the same cover in new location or not.

This provision is a departure from the former provisions in the policy, and is in addition thereto, in that it covers the goods removed to a new location for five days after such removal. Upon the expiration of the five days, of course, it would be incumbent upon the insured to have the policy transferred to the new location or a new policy written covering the goods in the new location.

Where it becomes necessary to remove goods by reason of a fire in the building containing the insured goods, or in an adjoining building, the insured is entitled to recover for loss or damage to the goods during the time of such removal.

Case v. Hartford Fire Ins. Co., 13 Ill. 676.
Agnew v. Ins. Co., 3 Phila. 193.
Peoria M. & F. Ins. Co. v. Wilson, 5 Minn. 53.
White v. Republic Fire Ins. Co., 57 Me. 91.
Lebanon Mut. Fire Ins. Co. v. Hankinson (Pa.), 2 Cent. R 828.
Sharpless v. Hartford Fire Ins. Co., 140 Pa. 437.

If fire occur, the insured shall give immediate notice of any loss thereby, in writing, to this company.

The courts have construed the word "immediate" in connection with the notice to be given a company of a fire to mean "within a reasonable time."

Peoria Ins. Co. v. Lewis, 18 Ill. 553.

"As soon as possible under the circumstances."
Cashan v. Northwestern Nat'l Ins. Co. (U. S. C. C.), 5 Bissel 476.

"Due diligence."
Continental Ins. Co. v. Lippold, 3 Neb. 391.
Woody v. Old Dominion Ins. Co. (Va.), 31 Grat. 362.
Niagara Fire Ins. Co. v. Scammon, 100 Ill. 644.
Scammon v. Germania Ins. Co., 101 Ill. 621.

The following have been held, under the circumstances, to be a compliance with the provision of the policy as to "immediate notice":

Five days after the fire:
West Branch Ins. Co. v. Helfenstein, 40 Pa. 289.

Thirty-five days after the fire:
Nickerbocker Ins. Co. v. McGinnis, 87 Ill. 70.

Eighteen days after the fire:
Woody v. Old Dominion Ins. Co., 31 Grat. 362.

Four days after the fire:
Lebanon Mut. Ins. Co. v. Erb., 112 Pa. 149.

The following have been held not to be immediate notice:
Thirty-eight days after the fire:
Inman v. Western Fire Ins. Co. (N. Y.), 12 Wend. 452.
Eleven days after the fire:
Trask v. State Fire and M. Ins. Co., 29 Pa. 198.
Twenty days after the fire:
Whitehurst v. North Carolina Mut. Ins. Co., 7 Jones 433.
Six days after the fire:
Railway Ins. Co., v. Burwell, 44 Ind. 460.
Eighteen days after the fire:
Edwards v. Ins. Co., 75 Pa. 378.
Three months after the fire:
LaForce v. Williams City Fire Ins. Co., 43 Mo. App. 518.
Thirty-three days after the fire:
Quenland v. Providence-Washington Fire Ins. Co., 15 N. Y. Supp. 317; 133 N. Y. 356.
Weed v. Hamburg-Bremen Ins. Co., 133 N. Y. 394.

The giving of the notice is a condition precedent to the right of the insured to recover under the policy in the absence of a waiver.
Sherwood v. Agricultural Ins. Co., 10 Hun. 593.
Ins. Co. v. McGookey, 33 O. St. 555.

Any person having an interest in the policy may give the notice of the loss.
Cornell v. LeRoy, 9 Wend. 163.
Farmers Mut. Ins. Co. v. Graybill, 74 Pa. 17.
Watertown Ins. Co. v. Grover & Baker Co., 41 Mich. 131.

Although this provision states that the notice must be in writing, verbal notice to the agent is held sufficient, especially if acted upon by the company or its adjuster.
Phillipps v. Protection Ins. Co., 14 Mo. 220.
Ins. Co. of North America v. McDowell, 50 Ill. 120.
Farmers Ins. Co. v. Taylor, 73 Pa. 342.
Killips v. Putnam Ins. Co., 28 Wis. 472.
Fisher v. Crescent Ins. Co., 33 Fed 534.

Protect the property from further damage, forthwith separate the damaged and undamaged, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon.

When the value of property is trifling in amount, and there is no proof that its value could have been improved, the failure of the assured to put the damaged property in the best possible order after the fire is not a cause for forfeiting the insured's rights under the policy.
Wright v. Hartford Fire Ins. Co., 36 Wis. 522.

Where the books and inventory of the insured were destroyed by the fire and the insured attempts in good faith to supply an inventory of the goods, and does so to the best of his

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ability, it is held to be a sufficient compliance with the terms of the policy.

People's Fire Ins. Co. v. Pulver, 127 Ill. 246.

In Powers Dry Goods Co. v. Imperial Fire Ins. Co., 48 Minn. 380, the court held that the insured was excused from making a complete inventory if the goods are so damaged that it is not reasonably practicable to make such inventory.

Within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all encumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire; and shall furnish, if required, verified plans and specifications of any building, fixtures or machinery destroyed or damaged.

Unless the company has waived the making of proofs of loss, they must be made according to the conditions of the policy and within the time limited by the policy.

Rockford Ins. Co. v. Seyferth, 29 Ill. App. 513.
Gould v. Dwelling House Ins. Co., 90 Mich. 302.
Burlington Ins. Co. v. Ross, 48 Kansas 228.
Allen v. Milwaukee Mechanics, 106 Mich. 204.

In the following case it has been held that the failure to furnish the proofs of loss within sixty days is not a cause for forfeiture:

Matthews v. American Cent. Ins. Co., 154 N. Y. 449.
Queen Ins. Co. v. Dearborn S., L. & B. Ass'n, 75 Ill. 371.
Flatley v. Phenix Ins. Co., 95 Wis. 618.
Kahnweiler v. Phœnix Ins. Co., 57 Fed. 562.

The agent of the insured may make proofs of loss where it is shown that the insured was not in a position to make the same personally.

Lumbermen's Mut. Ins. Co. v. Bell, 166 Ill. 400.
Roberts v. Northwestern National Ins. Co., 90 Wis. 210.

Where a loss is made payable to a mortgagee and the insured mortgagor refuses to make the proofs of loss, the same may be made by the mortgagee.

Nickerson v. Nickerson, 80 Me. 100.
Southern Home B. & L. Ass'n v. Home Ins. Co., 94 Ga. 167.

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Lombard Investment Co. v. Dwelling House Ins. Co., 62 Mo. App. 315.
Warren v. Springfield F. & M. Ins. Co., 13 Tex. Civ. App. 466.

In Pennsylvania it was held that where the insured property is a total loss and notice thereof is given, formal proofs of loss are not necessary.
Weiss v. American Fire Ins. Co., 148 Pa. St. 249.

It is sufficient for the insured to state in the proofs of loss that the fire occurred without any act, design or procurement on his part.
Howard Ins. Co. v. Hocking, 115 Pa. 415.
McNally v. Phœnix Ins. Co., 137 N. Y. 389.

The condition requiring a statement of all other insurance is complied with by inserting in the proofs a copy of the description contained in the other policies on the same property.
Towne v. Springfield F. & M. Ins. Co., 145 Mass. 582.

And so a statement, "$2,000 additional insurance, concurrent herewith," complies with this requirement of the policy.
Swoffold Bros. Dry Goods Co. v. American Cent. Ins. Co., 76 Mo. App. 27.

An objection that the proofs do not contain copies of the written portions of the other policies is not sustained where the other policies are named, the companies specified, the amount of the risk stated, and they are described as covering the same property and as concurrent with the one herein described, the written portions of which were given.
Jones v. Howard Ins. Co., 117 N. Y. 103.

The provision of the policy requiring the proofs to show the cash value of each item of the property and the amount of loss thereon, where the property insured was one hundred bales of cotton, is sufficiently complied with where the insured gave the number and weight of each bale and the value of the same in the aggregate.
Ætna Ins. Co. v. Peoples Bank, 62 Fed. 222.

The insured is not required to apportion the loss in his proofs to the several companies.
Fuller v. Detroit F. & M. Ins. Co., 36 Fed. 469.

The following have been held not to meet the requirements as to proofs of loss:
An estimate by carpenters of the cost of rebuilding the house:
Hensinkveld v. St. Paul F. & M. Ins. Co., 96 Ia. 224.

Failure to state origin of the fire and actual value of the property:
Brock v. Des Moines Ins. Co., 96 Ia. 39.

Where the policy insured two buildings and the proofs of loss referred to but one of the buildings:
Towne v. Springfield F. & M. Ins. Co., 145 Mass. 582.

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A statement containing only a list of the items of goods destroyed and damaged:

Scottish Union & Nat'l Ins. Co. v. Clancy, 83 Tex. 113.

Shall also, if required, furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify.

When requested by the company, the furnishing of a certificate by a magistrate or notary public is a condition precedent to the right of recovery on the policy.

Johnson v. Phœnix Ins. Co., 117 Mass. 49.
Ætna Ins. Co. v. Peoples Bank, 62 Fed. 222.
Protection Ins. Co. v. Pherson, 5 Ind. 417.

The certificate, however, need not be furnished unless "required" by the company.

Jones v. Howard Ins. Co., 117 N. Y. 103.
Michaelly v. Phœnix Ins. Co., 137 N. Y. 387.

A notary public is not a magistrate, and where the company requires the insured to furnish a certificate from a "magistrate", a certificate by a notary public is not a compliance with the requirement.

Cayon v. Dwelling House Ins. Co., 68 Wis. 510.

Where two magistrates or notaries live near the scene of the fire, the certificate must be procured from the one living nearest thereto. A certificate given by the other will not be deemed a compliance with the requirement.

Protection Ins. Co. v. Pherson, 5 Ind. 417.

The fact that the magistrate or notary living nearest to the scene of the fire refuses to give the certificate, will not excuse the insured from a compliance with the requirement so as to permit him to obtain the certificate from the next nearest magistrate or notary.

Leadbetter v. Ætna Ins. Co., 13 Me. 265.
Gilligan v. Commercial Fire Ins. Co. (N. Y.), 20 Hun. 93.
Johnson v. Phœnix Ins. Co., 112 Mass. 49; 3 Ins. L. J. 622; and cases cited therein.

In American Central Ins. Co. v. Rothschild, 82 Ill. 166, the court held that where there are several officers residing in the same immediate neighborhood, all of whom are competent to make the certificate, that of either of them will be a sufficient compliance with the conditions of the policy, and a distance of a few yards, more or less, from the scene of the fire will not be regarded as a matter of any importance. The court, in construing this provision, says:

"The provision in the policy, that the certificate therein required must be given by the nearest magistrate or notary public, was without serious doubt, inserted for the purpose of preventing the insured

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from selecting the officer to perform such duty. While this is so, the provision must have a reasonable, instead of a literal, construction. It does not, we think, require the distance should be determined by the extension of a straight line, or that a surveyor should be called in and an exact measurement taken; nor is it required that the assured should cross lots. In the absence of bad faith on the part of the assured in selecting the officer, nice distinctions as to the distance should not be indulged. A few feet more or less can not be material."

Williams v. Niagara Fire Ins. Co., 50 Ia. 561; 9 Ins. L. J. 38.

For other cases construing this provision of the policy, see:
Dolliver v. St. Joseph F. & M. Ins. Co., 131 Mass. 39.
Barnum v. Merchants Fire Ins. Co., 97 N. Y. 188.
Daniels v. Equitable Fire Ins. Co., 50 Conn. 551.
Kelly v. Sun Fire Office, 141 Pa. 10.

While the insured must furnish the certificate of the nearest magistrate or notary, when required, he is not bound by their estimate of the amount of the loss.

Birmingham Fire Ins. Co. v. Pulver, 126 Ill. 329; 18 Ins. L. J. 17.

The insured, as often as required, shall exhibit to any person designated by this company all that remains of any property herein described, and submit to examinations under oath by any person named by this company, and subscribe the same; and, as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof, if originals be lost, at such reasonable place as may be designated by this company or its representative, and shall permit extracts and copies thereof to be made.

In passing on this provision of the policy, the Supreme Court of the United States, in the case of Claflin v. Insurance Companies, 110 U. S. 81; 13 Ins. L. J. 177, says:

"The object of this provision in the policies of insurance was to enable the company to possess itself of all knowledge, and all information as to the other sources and means of knowledge, in regard to the facts, material to their rights, and to enable them to decide upon their obligation, and to protect them against false claims. And every interrogatory that was relevant and pertinent in such an examination was material, in the sense that a true answer to it was of the substance of the obligation of the assured. A false answer as to any matter of fact, material to the inquiry, knowingly and willfully made, with intent to deceive the insurer, would be fraudulent."

In the case of Gross v. St. Paul F. & M. Ins. Co., 22 Fed. 74; 14 Ins. L. J. 158, the plaintiff refused to submit to the examination. The court, in holding that the insured had thereby forfeited his rights under the policy, says:

"The stipulation is a valid one. It is one for the protection of the insurer, and not onerous to the insured. It is akin to the stipulation requiring the insured to exhibit his books of account, invoices, etc.; one in the interests of justice and fair dealing. The insurer may insist on compliance, and the insured must comply or give a valid excuse therefor. (Mueller v. Ins. Co., 45 Mo. 84; Dewees v. Ins. Co., 34 N. J. Law, 244.)"

The demand for the examination must be made with such clearness that the insured shall be fully informed that the com-

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pany means to insist upon having it. Mere informal conversations, or declarations that the company desires the insured to submit to an examination, does not impose that duty upon him.

State Ins. Co. v. Maackens (N. J.), 9 Vroom 564.

The insured is required to answer only such questions as have a material bearing upon the insurance and the loss. He can not be required to state on what terms he had settled with other companies or other matters not bearing on the loss.

Insurance Co. v. Wiedes, 81 U. S. 375.

Titus v. Glens Falls Ins. Co., 81 N. Y. 410.

The company is entitled to but one examination of the insured, and he can not be required, after having submitted to one examination, to answer questions subsequently put to him respecting the loss.

Moore v. Protection Ins. Co., 29 Me. 97.

Having submitted to the examination, the refusal of the insured to subscribe the same will forfeit his rights under the policy.

Bonner v. Home Ins. Co., 13 Wis. 677.

Grigsby v. German Ins. Co., 40 Mo. App. 276.

The insured is not estopped by his statement made at such examination, but may correct or explain any statement made by him during such examination upon the trial of the cause.

Commercial Ins. Co. v. Huchberger, 52 Ill. 464.

Germania Fire Ins. Co. v. Curran, 8 Kans. 9.

The insured has the right to have his attorney present during his examination.

Thomas v. Burlington Ins. Co., 47 Mo. App. 169.

It is a sufficient excuse for the non-production of books, that they were destroyed by fire.

Aurora Fire Ins. Co. v. Johnson, 46 Ind. 315.

Where the original invoices are destroyed by the fire, and the insured makes diligent and unavailing efforts to procure duplicate invoices, his action on the policy can not be defeated on account of the failure to comply with this requirement.

Miller v. Hartford Fire Ins. Co., 70 Ia. 704.

The insured is bound to furnish certified copies of bills and invoices from the persons from whom he purchased the goods, unless it is impossible to obtain them.

O'Brien v. Commercial Fire Ins. Co., 63 N. Y. 108.

Where an "iron-safe clause" is attached to the policy, the failure of the insured to keep his books and invoices in such a safe, and to produce them after loss, is a cause for forfeiture.

Robinson v. Ætna Fire Ins. Co. (Ala.), 34 S. 18.

Fire Association v. Calhoun (Tex.), 67 S. W. 153.

Hester v. Scottish Union & N. Ins. Co. (Ga.), 41 S. E. 552.

A safe such as was commonly used and such as, in the judgment of prudent men in the locality of the property insured, was

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sufficient, is a "fireproof safe" within the meaning of the iron-safe clause.

L. & L. & G. Ins. Co. v. Kearney et al., 180 U. S. 132.

For a full discussion of the conditions as to the keeping, producing and preserving books and papers, I refer you to a "note" to the case of Connecticut Fire Ins. Co., v. Jearry, 51 L. R. A. 698.

In the event of disagreement as to the amount of loss, the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them and shall bear equally the expenses of the appraisal and umpire.

All parties in interest should be requested to join in the appraisal. The weight of authority is to the effect that if any party interested in the loss is not joined and does not agree to submit the matter to appraisers, the award will not bind such party.

Where the policy is payable to a third party, "as his interest may appear," notice of the demand for appraisal should be served upon such third person. An appraisal and award had upon request by the company and the insured owner alone, and in which such third person is not requested to join, and does not join, will not bind him.

Brown v. Roger Williams Ins. Co., 5 R. I. 394.
Bergman v. Commercial Union Assur. Co., 92 Ky. 494; 21 Ins. L. J. 271.
Georgia Home Ins. Co. v. Stein, 72 Miss. 493.

In this last case there was an appraisal and award by the insured owner and the company, in which the mortgagee was not requested to participate. In holding that the mortgagee was not bound by the award, the court says:

"Stein had no more power to reduce the amount due and payable by the company to Tribette, either directly or by arbitration, than she had to surrender the policy and release the company from all obligation to pay Tribette anything. This question has been before many courts, and the opinions speak one voice.

"Association v. Blum, 63 Tex. 282; Hall v. Ass'n, 64 N. H., 405; 13 Alt., 648; Bergman v. Ins. Co., 92 Ky. 404; 18 S. W., 122; Harrington v. Ins. Co., 124 Mass., 126; Ins. Co. v. Sweetser, 116 Ind. 370; 19 N. E. 159; Brown v. Ins. Co., 5 R. I. 394."

In Chandos et al. v. American Fire Ins. Co., 84 Wis. 184; 22 Ins. L. J. 425, the court attempted to distinguish those cases where the policy recites "loss or damage payable to the mortgagee" from those cases where the policy was payable to the mortgagee "as her interest may appear". The court held that

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notice to, or consent of, the mortgagee was not necessary in such cases.

My opinion is that the safer course to pursue is to give notice to each and every person interested in the loss, with request that they join in the appraisal.

Where the insured is a corporation, a submission signed by the officers in charge of the business of the corporation is binding.

Remington Paper Co. v. London Assur. Co. (N. Y.), 43 N. Y. Supp. 431.

The provision of the policy is that the appraisers must be both "competent and disinterested". The term "disinterested" does not mean not interested financially, but that the person selected as appraiser shall not be personally interested in either of the parties. As said by the Court of Appeals of New York, in the case of Bradshaw v. Agricultural Ins. Co., 137 N. Y. 137; 22 Ins. L. J. 161:

"While it may be true that in the appointment of these appraisers each party nominates some one who may be supposed to be friendly to the side nominating him, yet he should at the same time be disinterested; or, in other words, fair and unprejudiced. The duties of these appraisers are to give a just and fair award—one which shall fairly and honestly represent the real loss actually sustained by reason of the fire; and it is not the duty of either appraiser to see how far he can depart from that purpose and still obtain the consent or agreement of his associate, or, in case of his refusal, then of the umpire. It it proper and to be expected that all the facts which may be favorable to the party nominating him shall be brought out by the appraiser, so that due weight may be given to them; but the appraiser is in no sense, for the purpose of an appraisal, the agent of the party nominating him, and he remains at all times under the duty to be fair and unprejudiced, or, in the language of the policy, 'disinterested.'"

The fact that the person selected as appraiser is a public adjuster of fire losses will not render him incompetent to act.

Meyerson v. Hartford Fire Ins. Co., 39 N. Y. Supp. 329.

The Supreme Court of Tennessee, in the case of Hickerson v. German-American Ins. Co. et al., 25 Ins. L. J. 422, in speaking of the selection of appraisers, says:

"In the selection of appraisers it is not contemplated that either party shall select a person with a view to sustain his own views, or further his own interest, but the appraisers are to act in a quasi judicial capacity, and as a court selected by the parties, free from all partiality and bias in favor of either party, and so as to do equal justice between them. This tribunal selected to act instead of the court and in place of a court must be, like a court, impartial, and not partisan; and if these provisions are not carried out in this spirit and for this purpose, neither party is precluded from going into the courts to reach his just deserts, notwithstanding the provisions."

Also see:

Levine et al. v. Lancashire Ins. Co., 66 Minn. 138.

Bullman v. North British & M. Ins. Co., 159 Mass. 118.

The appraisers should bear in mind only that they are appointed to ascertain the amount of the actual damage sustained by the insured; and allow the insured the fair cash value of the property. This is their sole duty. As to whether the company is

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liable for the loss, or to what extent it is liable, is not for them to consider or decide. The umpire should be selected by the appraisers with the same care as was, or should have been, exercised in their selection. He must be "competent and disinterested". If such person can be found in the vicinity of the loss, the appraiser representing the insured may rightfully insist that he be so selected.

Brock v. Dwelling House Ins. Co., 102 Mich. 583; 24 Ins. L. J. 464.

In this case the court says:

"Defendant's appraisers insisted upon the appointment of a person with whom he was presumably acquainted, who was a stranger to the locality, and to plaintiff's appraiser. The latter offered the names of twelve residents of the locality from which the jury, in case of suit, would be drawn. No valid reason is assigned for a refusal to accept one of the twelve, and the only reason given is that he did not care to take the chances of getting one that would be partial. The requirement that plaintiff's appraiser should go into other portions of the State to make inquiry as to the fitness of the persons named was not a reasonable one. The suggestion that some one be selected from the locality of the fire was not unreasonable."

In the case of Niagara Fire Ins. Co. v. Bishop, 154 Ill. 9; 25 Ins. L. J. 24, the court, in passing on the selection of the umpire, says:

"It would not be required in all cases that the umpire be selected from the vicinity of the loss. I think that all that the above cases decide is that, if 'a competent and disinterested person can be found in the vicinity of the loss to act as umpire, and such person is nominated by the appraiser of the insured, he should be selected in preference to a person distant from the locality. It is the duty of the appraiser for the company to inquire into the competency and disinterestedness of such person proposed who resides in the vicinity, and to not unreasonably and without any investigation reject him as umpire. Of course, if upon investigaton, such person or persons be found incompetent or interested, or biased and prejudiced in any way against the company, the appraiser for the company may, and it is his duty to, reject such nomination, and to insist upon the appointment of a competent and disinterested person as umpire, although such person may not be found in the vicinity. It often happens that a competent person can not be found in the vicinity or any place near the loss, as in the case of mill losses, loss on printing offices, etc. In such case it becomes necessary to call in an expert from a distant point. If, in such case, the appraisers for the insured should insist on some person in the vicinity being selected who had not the proper knowledge of the particular class of articles damaged to render him thoroughly competent to act as umpire, and refused to consider any other person, the appraiser for the company would be justified in refusing, and ought to refuse, to proceed with the appraisal.

"The duty of the umpire is to decide questions about which the appraisers disagree. He may be selected by the appraisers immediately upon their appointment, or the appraisers may wait until a disagreement occurs before selecting him. Caledonian Ins. Co. v. Traub et al. (Md.), 25 Ins. L. J. 791. He is to act only in case of disagreement, and if the appraisers agree, the umpire is not required to in any way participate in the appraisal. Enright v. Montauk Fire Ins. Co. (N. Y. S. C.), 15 N. Y. Supp. 893; Chandos v. American Fire Ins. Co., 84 Wis. 184; 22 Ins. L. J. 425."

After the appraisers have been selected, they may proceed in any manner they deem best to ascertain the loss or damage. All that is required is that they shall act fairly and honestly in appraising the loss or damage. They may hear evidence or

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refuse to hear it, and they may consult experts or rely on their own judgments.

DeGroot v. Fulton Fire Ins. Co. (N. Y.), 4 Robt. 504.
Levine v. Lancashire Ins. Co., 66 Minn. 138.
Hall v. Norwalk Ins. Co., 57 Conn. 105; 18 Ins. L. J. 518.

In the case of Continental Ins. Co. v. Garrett, 125 Fed. 589, the court held that the parties were entitled to notice of the time and place of the appraisal, that they might have opportunity for the production of evidence, where the property destroyed was a brick dwelling which had been so damaged that substantially nothing remained of the woodwork, inside or out; and the walls themselves were, in part, falling. The court, however, recognized the rule that the parties were not, in every case, entitled to be present and introduce evidence.

In the case of Hall v. Norwalk Ins. Co., 57 Conn. 105; 18 Ins. L. J. 518, the court says:

"In the first place, arbitrators are not forced to follow the strict rules of law, unless it be a condition of the submission that they shall do so. See Remelee v. Hall, 31 Vt. 583, and cases cited under the next proposition. If arbitrators have acted in good faith, neither party will be permitted to avoid the award by showing that they erred in judgment, either respecting the facts, or respecting the law, where the submission does not require them to follow the law; 6 Wait., Act. and Def. 553; Merritt v. Merritt, 11 Ill. 565; Moore v. Barnett, 17 Ind. 349; Fudickar v. Ins. Co. 62 N. Y. 392; Water Power Co. v. Gray, 6 Metc., 131. Again, if, as is directly found in this case, persons are selected as arbitrators by reason of special knowledge or skill possessed by them with reference to the matter in controversy, so that it is apparent that the parties intended to rely upon their personal information, investigation and judgment, they may even be justified in refusing altogether to hear evidence. Morse, Arb., 143; Wiberly v. Matthews, 91 N. Y. 648; Eads v. Williams, 24 L. J. Ch. 531; Railway Co. v. Lockhart, 3 Macq., 808; Johnston v. Cheape, 5 Dow. 247. The inquiry made by Mead for his own information, as to the prices paid for labor in Wallingford, in the absence of the parties and of the other arbitrator, will not be sufficient to set aside the award unless it appears (and it does not in this case) that the plaintiff was prejudiced, or that the decision was affected thereby.

"Morse, Arb. 127, 167; Straw v. Truesdale, 59 N. H. 109; Adams v. Bushey, 60 N. H. 290. Also see Springfield F. and M. Ins. Co. v. Payne (Kans.), 46 Pac. Rep 315."

See Bangor Sav. Bank v. Niagara Fire Ins. Co., 85 Me. 68; 23 Ins. L. J. 292.

Bad faith of the appraisers selected by either party, in refusing to proceed with the appraisement, or in insisting upon the selection of an umpire living distant from the vicinity of the loss. will justify the other in withdrawing from the appraisal.

Niagara Fire Ins. Co. v. Bishop, 154 Ill. 9; 25 Ins. L. J. 24.
Braddy v. New York Bowery Fire Ins. Co., 115 N. C. 354.
Chapman v. Rockford Ins. Co., 89 Wis. 572.
McCullough v. Phenix Ins. Co. et al., 113 Mo. 606; 22 Ins. L. J. 781.

In Brock v. Dwelling House Ins. Co., 102 Mich. 538; 24 Ins. L. J. 464, the court says:

"It is well settled that where the conduct of the company's appraiser in refusing to agree on an umpire is inexcusable, and virtually amounts to a refusal to proceed with the appraisement, the fact

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that the appraisement was not concluded before suit brought will not bar an action on the policy."

If, after an honest attempt, the appraisers fail to agree, and the company is in no manner responsible for their disagreement, the insured must propose the selection of other arbitrators, to the end that an award may be agreed upon and the basis for action determined. In the absence of fraud, bad faith or culpable neglect, or other conduct amounting to a refusal to proceed with the appraisal, the company has the right to stand on its contract rights.

Vernon Ins. Co. v. Maitlen, 158 Ind. 393.

Once the appraisers are selected, neither the company nor the insured has any legal right to seek to influence their action. and if either does seek to influence their action, it is sufficient excuse for the other abandoning the appraisal.

Powers Dry Goods Co. v. Imperial Fire Ins. Co., 48 Minn. 380; 21 Ins. L. J. 251.

Uhrig v. Williamsburgh City Fire Ins. Co., 101 N. Y. 362; 15 Ins. L. J. 312.

Stockton, etc., Works v. Glens Falls Ins. Co., 98 Cal. 557.

L. & L. & G. Ins. Co. v. Goehring, 99 Pa. 13; 11 Ins. L. J. 91.

An award by appraisers who have fairly and honestly appraised the damage, is binding upon the parties. It can only be set aside or voided for fraud of the parties or of the appraisers.

Hanover Fire Ins. Co. v. Lewis, 28 Fla. 209; 21 Ins. L. J. 316.

Morley v. L. & L. & G. Ins. Co., 85 Mich. 210; 20 Ins. L. J. 577.

Chandos v. American Fire Ins. Co., 84 Wis. 184, 22 Ins. L. J. 425.

Robertson et al. v. Lion Ins. Co., 73 Fed. 928.

London & L. Ins. Co. v. Storrs, 17 C. C. A. 645; 25 Ins. L. J. 283.

Fleming v. Phœnix Assur. Co., 27 N. Y. Supp. 488.

Springfield F. & M. Ins. Co. v. Payne (Kans.), 46 Pac. 315.

The New York Supreme Court, Appellate Division, in Remington Paper Co. v. London Assur. Corp., 43 N. Y. Supp. 431, says:

"The party who seeks to set aside an award upon the ground of mistake must show, from the award itself, that but for the mistake the award would have been different. The merits of an award, however unjust or unreasonable it may be, can not be reinvestigated, for otherwise the award, instead of being the end of a litigation, would simply be a useless step in its progress. In the absence of proof of corruption, bad faith or misconduct on the part of the arbitrator, or palpable mistake appearing on the face of the estimate, neither party can be allowed to prove that he decided wrong as to law or facts."

If, however, either party has been guilty of fraud, either in person, by agent or the appraiser selected by him to act in his interest, the award can not stand, but will be set aside.

Bradshaw v. Agricultural Ins. Co., 137 N. Y. 137; 22 Ins. L. J. 161.

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Also see:

Herndon v. Imperial Fire Ins. Co., 110 N. C. 279; 21 Ins. L. J. 990.

Glover v. Rochester German Ins. Co., 11 Wash. 143; 39 Pac. 380.

Adams v. New York Bowery Fire Ins. Co., 85 Iowa 6; 19 Ins. L. J. 730.

Hartford Fire Ins. Co. v. Bonner, etc., Co., 44 Fed. 151; 20 Ins. L. J. 232.

The fact that the appraisers were not sworn on oath to properly appraise the loss is not sufficient to vacate their award. As said in Zallee v. Laclede Mut. F. & M. Ins. Co., 44 Mo. 530:

"This was not a submission to arbitration in a legal sense, which supposes a controversy, but merely carrying out a provision of the policy, and the finding is a mere report as evidence, not as a bar to a suit, and extinguishes no cause of action, and therefore the proceeding is not void for want of the oath."

An award by one appraiser and the umpire is not binding in the absence of proof that there was a difference between the appraisers.

Caledonian Ins. Co. v. Traub, 86 Md. 86; 25 Ins. L. J. 690.

Manufacturers & Builders Fire Ins. Co. v. Mullen, 48 Neb. 620.

Hill v. Home Ins. Co. (Mass.), 9 Ins. L. J. 814.

It has been held that where the appraisers failed to agree, whether in good faith or by reason of the bad faith of one of the appraisers, the other appraiser and the umpire have power to proceed and make an award.

Doying et al. v. Broadway Ins. Co., 55 N. Y. Law 569.

This ruling, however, was made by a divided court, and I do not believe is a good law. If the appraiser of the company refuses to proceed to an award, or unduly and fraudulently obstructs an appraisal and award, this would be ground for an abandonment of the appraisal by the plaintiff's appraiser; but surely it could not authorize him and an umpire, in the absence of the company's representative, to proceed to an award.

After an award has been made, the appraisers have no right to change or amend it.

Eddy v. London Assur. Corp., 20 N. Y. Supp. 216.

If the award is uncertain as to amount of damages, it will be void.

St. Paul F. & M. Ins. Co. v. Gotthelf, 35 Neb. 351; 53 N. W. 137.

If the award has been obtained by fraudulent means, equity will relieve the party therefrom.

North British & M. Ins. Co. v. Lathrop, 70 Fed. 429.

I can have but few words to add to the above decisions. Let the appraisers act fairly, striving only to arrive at a just valuation. An appraiser may be partisan, and fairly partisan, in this,

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and no further, that the other side does not obtain any advantage over the party whom he is chosen to represent. He must not, while protecting the interest placed in his care, seek unduly and by questionable practices or fraudulent methods to obtain advantage over the other appraiser. The appraisers should bear in mind at all times that they are not attorneys or agents for the parties appointing them, but are acting in a quasi judicial capacity, sitting as a court, and should act as a court should act, striving to do equal justice between the parties. If the appraisers act within these bounds, there award will be upheld, but if either departs therefrom, no court will hesitate to set aside the award.

This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act or proceeding on its parts relating to the appraisal or to any examination herein provided for.

The decisions construing this provision of the policy are not uniform. In some of the States it is held that the provision is valid and that the company does not waive any defense which it may have to the claim by requiring the insured to submit to an examination, under oath, or by an agreement to submit the amount of loss to appraisal.

In the case of Hill v. London Assur. Corp., 9 N. Y. Supp. 500, the court, in construing this clause, says:

"We think the learned trial judge also erred in holding under this particular policy that a waiver could be inferred by the reference of the matter after the fire to the adjuster for investigation and appraisal. It is well settled that if, after knowledge of any alleged forfeiture, the company 'recognizes the continued validity of the policy, or does acts based thereon, or requires the insured, by virtue thereof, to do some act or incur some trouble or expense, the forfeiture is, as matter of law, waived.' Titus v. Ins. Co., 81 N. Y. 410. But this doctrine of implied waiver can not be invoked where, as in the policy under consideration here, there is an express provision that the company may cause investigation and appraisal to be made without being deemed to have waived any forfeiture.

The Supreme Court of Michigan construed this provision of the policy, in the case of Briggs v. Fireman's Fund Ins. Co., 16 Ins. L. J. 471, where it says:

"It is claimed that the fact of the agent of the company going to the scene of the fire and making inquiries, without showing what such inquiries were, and of requesting an arbitration to fix the amount of the loss, and the plaintiff paying one-half of the expense of the arbitrators, constituted a waiver of any forfeiture on the ground of overvaluation. We can not concede this claim. The company had a right to make inquiries—to investigate—both as to the origin of the fire and the value of the property, and the contract between the parties was that an arbitration for the sole purpose of determining the amount of the loss might be had upon request of either party, and that the expense thereof should be borne equally, and the agreement to arbitrate expressly stipulated that such submission should not be taken as a waiver on the part of the company of the conditions of the policy. In view of these facts, there is no room for claiming a waiver on the part of the company."

The decision of the New York Court of Appeals, in the case of Bishop v. Agricultural Ins. Co., 130 N. Y. 488, is in conflict with the case of Hill v. London Assur. Corp., 9 N. Y. Supp. 500,

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quoted from above; and, being the decision of the highest court in New York, must control that case.

In the Bishop case the insured had neglected and failed to furnish proofs of loss within the time required by the policy. More than seventy days after the fire, the insured and the company entered into a written submission for appraisal of the loss. The insured claimed that the company thereby waived his failure to furnish the proofs of loss within the time required by the policy. The company claimed that it was protected against waiver by the above conditions of the policy. The court held that the contract for submission to appraisal, being made more than seventy days after the loss, was a waiver of the provision in the policy that proofs of loss must be furnished within sixty days.

The Supreme Court of Tennessee, in the case of North German Ins. Co. v. Morton-Scott-Robertson Co., 31 Ins. L. J. 580; 15 Ins. Dig. 56, in arriving at a different conclusion, says:

"We are also of opinion that when an insurance company demands an appraisal or estimate of loss it must be held to have conceded its liability for some amount, and the only question that remains open is the amount of the loss. This is the last step to be taken in the adjustment of a loss, and not the first one, as is usually held by insurance companies. Unless it be in exceptional cases, there is no necessity for an appraisal as long as liability is denied, and, when the appraisal is demanded, other questions which go merely to the liability of the insurance company must be treated as waived. Hickerson v. Ins. Co., 96 Tenn. 193."

In the case of Corson v. Anchor Mut. Fire Ins. Co. (Ia.), 85 N. W. 806, the adjuster of the company, after having acquired knowledge of a breach of a policy condition, insisted that before he would proceed with the adjustment of the loss the insured should sign an agreement by which it was stipulated that "nothing said adjuster may do or say or write shall in any way be construed as waiving any of the rights or defenses of said company, or any conditions or requirements of said policy, as to proofs of loss or otherwise."

The court, in construing this agreement, says:

"The non-waiver agreement did not destroy the effect of the waiver, which, in the absence of such an agreement, would have arisen out of the acts and conduct of the adjuster."

Where the New York standard form of policy is not used, and the form used does not contain the non-waiver agreement, it is uniformly held that the company, by requiring the insured to submit to an examination or appraisal, thereby waives all defenses known to it which it may have to the claim. The leading case on this question is Titus v. Glens Falls Ins. Co., 81 N. Y. 410. In that case the provision of the policy against foreclosure proceedings had been violated. After the fire, and after the company had notice of the violation of the policy conditions, it required the insured to submit to an examination under oath. In holding that the company thereby waived the forfeiture, the court says:

"It had the right to make such examination only by virtue of the policy. When it required him to be examined, it exercised a right given

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to it by the policy. It then recognized the validity of the policy and subjected the insured to trouble and expense after it knew of the forfeiture now alleged, and it can not now, therefore, assert its invalidity on account of such forfeiture."

Waiver or estoppel is the bete noir of the insurance companies. It is a rare case in which this question is not raised against them. Attorneys for the companies too often find, when they get into court, that some officer, agent or adjuster has unwittingly thrown away all the defenses to the action. One of the grounds upon which a waiver or estoppel is often based is the demanding of proofs of loss, or other action of the insured, with knowledge that a forfeiture has been incurred.

The courts, in applying the doctrine of waiver and estoppel to insurance contract, seem to make no distinction between them. As said in the case of Kiernan v. Dutchess County Mut. Ins. Co., 150 N. Y. 190:

"The distinction between waiver and estoppel, as applied to the law of insurance, is not in all respects clearly defined. An express waiver is in the nature of a new contract, modifying to some extent the old one. It does not require a new consideration, unless it is by inducing a change of position, for the law of waiver seems to be a 'technical doctrine, introduced and applied by courts for the purpose of defeating forfeitures.' An estoppel forbids the assertion of the truth by one who has knowingly induced another to believe what is untrue and to act accordingly. While express waiver rests upon intention and estoppel upon misleading conduct, implied waiver may rest upon either, for it exists when there is an intention to waive unexpressed, but clearly to be inferred from circumstances, or when there is no such intention in fact, but the conduct of the insurer has misled the insured into acting on a reasonable belief that the company has waived some provision of the policy. While the principle may not be easily classified, it is well established that if the words and acts of the insurer reasonably justify the conclusion that with full knowledge of all facts it intended to 'abandon or not or insist upon the particular defense afterwards relied upon,' a verdict or finding to that effect establishes a waiver, which, if it once exists, can never be revoked."

The leading case against the companies on this question is Titus v. Glens Falls Ins. Co., 81 N. Y. 410, 9 Ins. L. J. 664.

In this case the provision of the policy against foreclosure proceedings has been violated. After the fire, and after the defendant had notice of the proceedings, it required the insured to appear before a person appointed by it for the purpose, to be examined under the clause in the policy, and he was there subjected to a rigorous inquisitorial examination. In holding that the company thereby waived the forfeiture the court says:

"It had the right to make such examination only by virtue of the policy. When it required him to be examined, it exercised a right given to it by the policy. It then recognized the validity of the policy, and subjected the insured to trouble and expense after it knew of the forfeiture now alleged, and it can not now, therefore, assert its invalidity on account of such forfeiture.

"When there has been a breach of a condition contained in an insurance policy, the insurance company may or may not take advantage of such breach and claim a forfeiture. It may, consulting its own interests, choose to waive the forfeiture, and this it may do by express language to that effect, or by acts from which an intention to waive may be inferred, or from which a waiver follows as a legal result. A waiver can not be inferred from its mere silence. It is not obliged to do or say anything to make the forfeiture effectual. It may

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wait until claim is made under the policy, and then, in denial thereof or in defense of a suit commenced therefor, allege the forfeiture. But it may be asserted broadly that if in any negotiations or transactions with the insured after knowledge of the forfeiture, it recognizes the continued validity of the policy, or does acts based thereon, or requires the insured, by virtue thereof, to do some act or incur trouble or expense, the forfeiture is, as a matter of law, waived, and it is now settled in this court, after some difference of opinion, that such a waiver need not be based upon any new agreement or an estoppel."

In the case of Gans v. St. Paul F. and M. Ins. Co., 43 Wis. 108, 7 Ins. L. J. 303, the provision of the policy against vacancy had been violated. Of this fact the agents had notice. Proofs of loss were made out soon after the fire, by or under the direction of such agents, and forwarded to the company. These not being satisfactory, the company required further proofs, and the same were made out and forwarded in due time, at an expense to the insured of $5. The last proofs contained a statement that the building had been vacant. In holding that there had been a waiver of the forfeiture the court says:

"When, therefore, the company required the plaintiff to furnish additional proofs of loss, it had constructive notice that the insured building had remained unoccupied in violation of the terms of the policy, and that the policy was, therefore, voidable (Webster v. Ins. Co., supra), and might then be declared void at its election. Instead of declaring it void, the company took the opposite course, by subjecting the plaintiff to expense and delay. The learned counsel for the defendant argues with much plausibility that it was not inconsistent with the position that the company elected to consider the policy void for it to require the plaintiff to furnish further proofs of loss, which should show under his own hand and oath that the insured building was vacant when burned—a fact which did not appear by the first proofs. But the company had legal notice of the fact, and we think it was not competent for it to subject the plaintiff to further expense and delay in order to obtain from him cumulative evidence that the building was vacant, without prejudice to its right to declare the policy void. It should have made its election in the first instance."

In the case of Brown v. State Ins. Co., 74 Ia. 428; 18 Ins. L. J. 137, the insured violated a condition of the policy requiring him to keep his books and inventory in a fireproof safe. The adjuster who went to the scene of the fire and examined insured with reference to the circumstances of the loss was informed of this violation. After the examination, the adjuster served written notice on insured to furnish certified copies of the original bills of purchase from the various houses from which the goods were purchased. In compliance with this demand insured procured from the wholesale houses copies of the invoices of the goods purchased by him from them during the time covered by the demand. In doing that he spent considerable time and incurred some expense and inconvenience. He notified the company that he had procured them, and the adjuster again went to his place and examined them, and it was not until that was done that the company refused to pay the loss. The court, in holding that here had been a waiver, says:

"When the defendant was informed of the destruction of the books and inventories, and the manner in which they had been kept, it had the right—assuming that those facts constituted a forfeit, as the court below held they did—at once to stand upon the forfeiture and

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declare the contract at an end. But it had the right also to waive the forfeiture and treat the contract as still in force, leaving the question whether it would pay the loss to depend upon subsequent investigation as to other facts. By its demand for the production of the copies of the invoices and bills it made this latter election, for it thereby required plaintiff to produce for its inspection the evidence as to other facts upon which the question of its liability, independent of the forfeiture, depended. Having required plaintiff to incur the labor and expense of procuring the bills and invoices, and having obtained whatever advantages accrued from their production, it would be manifestly unjust to permit it now to go back and take advantage of the forfeiture."

The case of Marthinson et al v. North British and Mercantile Ins. Co., 64 Mich. 372, is very strong against the companies on this question. In this case the superintendent of the company made repeated objection to the proofs of loss, requesting the insured to amend the proofs to conform to the objection. At the end of each request the superintendent stated: "You will further take notice that in returning said papers and making the objections thereto, and in all other matters herein, this company waives none of its rights and defenses under their said policy, but expressly reserves each and every one thereof unto itself." In holding that there had been a waiver of defenses ,the court says:

"It is argued by defendant's counsel that the defendant saved its rights, and waived none of its defenses under the application or policy, by reason of the last clause of Cornell's first letter, to-wit: 'You will further take notice that, in returning said papers and making objections thereto, and in all other matters herein, this company waives none of its rights and defenses under their said policy, but expressly reserves each and every one thereof unto itself,' which clause, in substance, was repeated in other letters. We do not think this general reference to other possible defenses was sufficient. It devolved upon the defendant to specifically state its defenses, or some of them, if it had any other than those going to the defects in the proofs of loss. If the company had frankly stated that it refused to pay the alleged loss because of the breaches of warranty and forfeiture by the conditions of the policy, the knowledge of which it then possessed, the assured would have, in all probability, gone no farther into cost and trouble to perfect such proofs of loss, as their refusal to pay on other grounds would have rendered it unnecessary. This loose and general reservation of their rights can not be considered as an adequate notice of the defenses insisted upon at the trial, and it must be held that such defenses were waived by their conduct. Mercantile Ins. Co. v. Holthaus, 43 Mich. 423."

In the case of Burnham et al. v. Interstate Casualty Co., 117 Mich. 142, 27 Ins. L. J. 689, the company, having notice of the breach of warranty in the application, answered a request for blank forms for making proofs of death as follows: "You fail to give any particulars, or even the date ,of the alleged accident, which we are entitled to have immediately in case of accidental injury or death. Although we do not understand how you are going to affirmatively prove accidental death in this case, under the circumstances, yet we will comply with your request and forward the blanks as requested, subject to the notices and stipulations printed thereon."

The blank proof of death furnished contained the following notice: "These blanks are sent to permit a statement of facts,

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and the furnishing of the same shall not be held to be a waiver of any of the agreements or conditions of the policy or of the application, nor of the rights of the company in the event of any violation of such agreements or conditions by the insured, or beneficiaries, or in any event."

In holding that there had been a waiver of the breach of warranty the court says:

"On receipt of the letter from Mr. Babcock, attorney for Mrs. Winans, asking for the blank forms which the company desired to have used for proofs of death, good faith required that, if the company expected to rely upon a defense which would render proofs of loss wholly unavailing, notice of this fact should be given promptly, inasmuch as it was made apparent by Mr. Babcock's letter that the assured would otherwise be put to expense in the preparation of proofs of loss. The learned counsel for the defense, in his brief says: 'The nature of the company's business should be kept in view. It might, from motives of business policy alone, be inclined to waive the breach of warranty, if, on the investigation of all the facts, it came to the conclusion that an honest loss had been incurred.' This is undoubtedly true, and in my judgment the time for the company to determine that question was when it was made known to it that the withholding of such claims of defense, and the furnishing of blanks, would be likely to result in expense to the assured. Having failed to disclose the defense at that time, and having permitted the assured to incur this expense, the defense should be deemed waived. Marthinson v. Ins. Co., 64 Mich. 372; Towle v. Ins. Co., 91 Mich 219; Titus v. Ins. Co., 81 N. Y. 410. The general statement appended to the blank proof of loss, reserving a right to insist upon a breach of conditions, should not be held to reserve a defense known to the company at that time. Marthinson v. Ins. Co., supra. Nor do I think that the fact that the information that Mr. Winans had other insurance was not derived from the beneficiaries affects the question. It is knowledge of the fact, and the action of the company requiring the beneficiaries to incur expense, that renders it an act of bad faith to thereafter seek to avoid the policy."

Two judges dissented to this opinion.

The standard policy provides that "this company shall not be held to have waived any provision of condition of this policy or any forfeiture thereof by any requirement, act or proceeding on its part relating to the appraisal or to any examination herein provided for."

While this provision has been sustained in the courts of those States requiring the use of the standard form of policy, and in some States outside, other courts have held that the demand for an appraisal is a waiver of all defenses known to the company at the time. In North German Ins. Co. v. Morton-Scott-Robertson Co., 31 Ins. L. J. 580, 15 Ins. 56, the Tennessee Supreme Court, in passing on this question, says:

"We are also of opinion that when an insurance company demands an appraisal or estimate of loss it must be held to have conceded its liability for some amount, and the only question that remains open is the amount of the loss. This is the last step to be taken in the adjustment of a loss, and not the first one, as is usually held by insurance companies. Unless it be in exceptional cases, there is no necessity for an appraisal as long as liability is denied, and, when the appraisal is demanded, other questions which go merely to the liability of the insurance company must be treated as waived. Hickerson v. Ins. Co., 96 Tenn. 193."

In the case of Corson v. Anchor Mut. Fire Ins. Co. (Ia.), 85 N. W. 8066, the adjuster of the company, after having acquired

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knowledge of a breach of a policy condition, insisted that before he would proceed with the adjustment of the loss the insured should sign an agreement by which it was stipulated that "nothing said adjuster may do or say or write shall in any way be construed as waiving any of the rights or defenses of said company, or any conditions or requirements of said policy as to proofs of loss or otherwise."

The court, in construing this agreement, says:

"The non-waiver agreement did not destroy the effect of the waiver which, in the absence of such an agreement, would have arisen out of the acts and conduct of the adjuster."

In the case of New York Life Ins. Co. v. Baker, 83 Fed. Rep. 647, 27 Ins. L. J. 350, the company, after being informed of certain breaches of warranty, objected to the proofs of loss and required the claimant to procure a certified copy of letters of guardianship issued to her, and proof of her qualification as executrix of the will of the insured. The court, in holding that the company, thereby waived the right to insist upon the breach of warranties, says:

"We think that the acts in question amounted both to a waiver and an *estoppel in pais*. Good faith and fair dealing required the company to be more prompt in asserting its right to treat the policy as void, and in taking the necessary steps to rescind the contract. Moreover, after it became aware that the policy was invalid, it was not entitled to exact from the plaintiff a technical compliance with the provisions of the policy relative to proofs of loss, which would involve her in trouble and expense, unless, on its part, it had resolved to pay the loss when such proofs were supplied."

For other cases holding that the company had waived its defenses by requiring proofs of loss, or other action on the part of the insured, after having knowledge of facts constituting a forfeiture, see following:

Silverberg v. Phenix Ins. Co., 67 Cal. 36;
German Fire Ins. Co. v. Grunert, 112 Ill. 68;
Hollis v. State Ins. Co., 65 Ia. 454;
Canada Landed Credit Co. v. Canada Agricultural Ins. Co., 17 Grant's Ch. 418;
Eagan v. Ætna Fire and Marine Ins. Co., 10 W. Va. 583, 6 Ins. L. J. 832;
Northwestern Mut. Life Ins. Co. v. Germania Fire Ins. Co., 40 Wis. 446;
Cannon v. Home Ins. Co., 53 Wis. 585, 11 Ins. L. J. 741;
Towle v. Ionia, etc., Ins. Co., 91 Mich. 219;
Parsons v. Knoxville Ins. Co., 132 Mo. 583, 25 Ins. L. J. 719;
Billings v. German Ins. Co., 34 Neb. 502, 21 Ins. L. J. 929;
Home Fire Ins. Co. v. Kennedy, 47 Neb. 138;
Hanover Fire Ins. Co. v. Bohn, 48 Neb. 743, 25 Ins. L. J. 681;
Home Fire Ins. Co. v. Phelps, 51 Neb. 623;
Walker v. Phœnix Ins. Co., 156 N. Y. 510;
McNally v. Phœnix Ins. Co., 137 N. Y. 389;
Kiernan v. Dutchess County Mut. Ins. Co., 150 N. Y. 590, 26 Ins. L. J. 733;

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Neafie v. Woodcock, 15 Hun's App. 618;
Georgia Home Ins. Co. v. Goods, 95 Va. 751;
Dick v. Equitable Fire and Marine Ins. Co., 92 Wis. 46, 25 Ins. L. J. 449;
Kidder v. Knights Templars and Masons' Life Ins. Co., 94 Wis. 538;
Burnham v. Interstate Cas. Co., 117 Mich. 142, 27 Ins. L. J. 688;
Cie. d'Assurance v. Villeneuve, 2 Mont. L. B. (Q. B.) 89;
Georgia Home Ins. Co. v. Moriarty (Tex. C. C. A.), 37 S. W. 628;
Roby v. American Central Ins. Co., 120 N. Y. 510, 9 Ins. L. J. 762;
Replogle v. The American Ins. Co. et al., 132 Ind. 360, 22 Ins. L. J. 815;
Milwaukee Mechanics' Ins. Co. v. Stewart et al., 13 Ind. App. 640;
Supreme Tent of the Knights of the Macabees of the World v. Volkert, 25 Ind. App. 627;
German-American Ins. Co. v. Evants (Tex.), 61 S. W. Rep. 536, 30 Ins. L. J. 827;
Georgia Home Ins. Co. v. Allen (Ala.), 30 So. Rep. 537, 31 Ins. L. J. 60;
Chicago Guaranty Fund Life Soc. v. Wilson, 91 Ill. App. 667;
Hunt v. State Ins. Co., 92 N. W. 921, 16 Ins. Dig. 26;
Traders' Mut. Life Ins. Co. v. Johnson, 65 N. E. 634, 16 Ins. Dig. 139.

Cases in Favor of Company.

As stated above, in those States where a standard form of policy is provided for it is held that a demand for an appraisal is not a waiver of known defenses. Thus, in the case of Hill v. London Assur. Corporation, 9 N. Y. Supp. 500, the court, in passing on this question, says:

"We think the learned trial judge also erred in holding under this particular policy that a waiver could be inferred by the reference of the matter after the fire to the adjuster for investigation and appraisal. It is well settled that if, after knowledge of any alleged forfeiture, the company 'recognizes the continued validity of the policy, or does some act based thereon, or requires the insured, by virtue thereof, to do some act or incur some trouble or expense, the forfeiture is, as a matter of law, waived.' Titus v. Ins. Co., 81 N. Y. 410. But this doctrine of implied waiver can not be invoked where, as in the policy under consideration here, there is an express provision that the company may cause investigation and appraisal to be made without being deemed to have waived any forfeiture."

The Supreme Court of Michigan construed this provision of the policy in the case of Briggs v. Fireman's Fund Ins. Co., 16 Ins. L. J. 471, where it says:

"It is claimed that the fact of the agent of the company going to the scene of the fire and making inquiries, without showing what such inquiries were, and of requesting an arbitration to fix the amount of the loss, and the plaintiff paying one-half the expense of the arbi-

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trators, constituted a waiver of any forfeiture on the ground of overvaluation. We can not concede this claim. The company had a right to make inquiries—to investigate—both as to the origin of the fire and the value of the property, and the contract between the parties was that an arbitration for the sole purpose of determining the amount of the loss might be had upon the request of either party, and that the expense thereof should be borne equally, and the agreement to arbitrate expressly stipulated that such submission should not be taken as a waiver on the part of the company of the conditions of the policy. In view of these facts, there is no room for claiming a waiver on the part of the company."

This ruling has been followed in Texas. City Drug Store v. Scottish Union and National Ins. Co., 44 S. W. 21.

In the case of Sharpe v. Commercial Travelers' Mut. Acc. Ass'n, 139 Ind. 92, the company, on being requested to send blanks, stated that they did not know why claimant wanted blanks, as insured's death was not caused by an accident. In a later letter inclosing blanks the company repeated this statement, and further said that, while not being able to prevent her from putting in a claim, she should understand that the association was an accident association. It also stated that proofs should contain the particulars of the post-mortem, signed by the surgeons. The court held that the company had not waived any of its defenses.

For other cases in favor of the company see:

Boyd v. Vanderbilt Ins. Co., 90 Tenn. 212, 20 Ins. L. J. 652;
Armstrong v. Agricultural Ins. Co., 130 N. Y. 560, 21 Ins. L. J. 431;
Phœnix Ins. Co. v. Stevenson, 78 Ky. 150, 8 Ins. L. J. 922;
Stevens v. Mechanics and Traders' Ins. Co., 83 N. Y. 168;
Graham v. Fireman's Ins. Co., 9 Daly 341 (Berryman's Dig., Vol. 2, p. 1685), 11 Ins. L. J. 64;
Illinois Live Stock Ins. Co. v. Kirkpatrick, 61 Ill. App. 74;
Gibson Electric Co. v. L. and L. and G. Ins. Co., 10 Hun's App. 225, 28 Ins. L. J. 629;
Freedman v. Fire Ass'n., 168 Pa. St. 249, 25 Ins. L. J. 74;
Freedman v. Providence-Washington Ins. Co., 175 Pa. St. 350, 27 Ins. L. J. 215;
Roberts v. Sun Mut. Ins. Co., 19 Tex. Civ. App. 338;
Oshkosh Match Works v. Manchester F. Assur. Co., 92 Wis. 510;
Hughes v. Wis. Odd Fellows' Lodge, 98 Wis. 292;
Phœnix Ins. Co. v. Flemming, 65 Ark. 54, 27 Ins. L. J. 584;
Labell v. Georgia Home Ins. Co. (Tex. C. C. A.), 28 S. W. 133, 26 Ins. L. J. 461;
Burnham v. Royal Ins. Co., 75 Mo. App. 394, 27 Ins. L. J. 928;
Ronald v. Mut. Reserve Fund, 7 N. Y. Supp. 152, 21 Ins. L. J. 634;
Hill v. London Assur. Corp., 9 N. Y. Supp. 500;
Queen Ins. Co. v. Young, 86 Ala. 424;
Curlee v. Texas Home Fire Ins. Co., 73 S. W. 831, 16 Ins. Dig. 70;
Keet-Rountree Dry Goods Co. v. Mercantile Town Mut. Ins. Co., 74 S. W. 469, 16 Ins. Dig. 76;

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Hayes et al. v. United States Fire Ins. Co., 44 S. E. 404, 16 Ins. Dig. 84;
Loesch v. Union Casualty and Surety Co., 75 S. W. 621, 16 Ins. Dig. 333.

Under these decisions there is but one safe course for the companies to pursue after learning of a cause for forfeiture, and that is to cease all further communications with the insured or his attorney. If a further investigation is desired, it should be made without consulting the insured, and he should not be requested to render any assistance. If the insured requests blanks for making proofs of loss, they should be sent him, but, to save a waiver, it should be distinctly stated that the company denies liability and sends the blanks as a matter of courtesy, reserving all defenses it may have to the claim. While there is respectable authority to the effect that, under the standard form of policy, an appraisal may be had without waiver, I do not believe these cases will be generally followed in those States having no statutory provision for a standard policy form.

Some of the earlier cases (see Phœnix Ins. Co. v. Stevenson, 78 Ky. 150) hold that the company has the right to exact proofs of loss without incurring a waiver of its defenses, but all the later cases are the other way.

In view of the conflict in the decisions, it would seem that the only safe course to pursue, where the company has a known defense to the claim, in those States where there is no decision on the subject, is to investigate the amount of loss and damage independently of the insured; that the insured should not be required to submit to an examination, nor to enter into a contract for appraisal, nor put to any trouble or expense whatever in the matter.

And the loss shall not become payable until sixty days after the notice, ascertainment, estimate and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers, when appraisal has been required.

The delay of sixty days in which to make payment is a substantial right, not merely to enable the company to prepare to pay, but also to investigate the circumstances under which the loss occurred, with a view of determining whether or not the loss is of such a character as creates a liability to make any payment at all.

Doyle v. Phœnix Ins. Co., 44 Cal. 264.
Spare v. Home Mut. Ins. Co., 19 Fed. 14; 13 Ins. L. J. 280.

A full compliance with the above provision of the policy by the insured is a condition precedent to his right to claim payment under the policy; and, unless waived by the company, the insured can not maintain a suit on the policy until after full compliance with the conditions.

Columbian Ins. Co. v. Lawrence (U. S.), 10 Peters 507.

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Shawmut Sugar Refining Co. v. People's Mut. Fire Ins. Co., (Mass.), 12 Gray 535.
Davis v. Davis, 49 Me. 282.
Cascade F. and M. Ins. Co. v. Journal Pub. Co., 1 Wash. 452; 21 Ins. L. J. 395.

The limit of sixty days, prescribed for payment becoming due, runs from the time proofs are originally furnished. A subsequent examination of the insured, had at the instance of the company, does not delay the time for making payment.
Huchberger v. Home Ins. Co., 5 Bissel 106.
Clover v. Greenwich Ins. Co., 101 N. Y. 277.

Where the company examines the insured under oath, before he has submitted proofs of loss, the sixty days, prescribed to run before the loss shall become due and payable, commences from the time of the delivery of such examination to the company.
Badger v. Phœnix Ins. Co., 49 Wis. 396.

The sixty days within which to make payment do not begin to run until the proofs are entirely completed or the award made.
McNally v. Phenix Ins. Co., 42 N. Y. State R. 21.

Where, however, the company or its agent, on receiving notice of the loss, denies all liability under the policy, the loss becomes payable immediately, and suit may be brought without awaiting the expiration of the sixty days.
Baltimore Fire Ins. Co. v. Loney, 20 Md. 20.
Ætna Ins. Co. v. McGuire, 51 Ill. 342.
German Ins. Co. v. Gibson, 53 Ark. 494.

A denial of all liability except for a specified sum, much less than that claimed by the insured, and offer to pay such sum, amounts to a denial of liability, and is a waiver of the sixty days' time within which to make payment, so that the insured may bring his action without awaiting the expiration of such time.
Commercial Fire Ins. Co. v. Allen, 80 Ala. 571; 16 Ins. L. J. 641.

In Iowa there is a special statute which provides that no action on a policy of insurance "shall be begun within ninety days after the notice of loss has been given." Under this statute it is held that a denial of liability by the company does not give the insured an immediate right to action, but that he must await the expiration of the ninety days.
Vore v. Hawkeye Ins. Co., 76 Ia. 548.
Quinn v. Capital Ins. Co., 71 Ia. 615.
Taylor v. Merchants and B. Ins. Co., 83 Ia. 402.

If the loss is not paid within the sixty days, the insured is entitled to interest on the amount of his loss.
Knickerbocker Ins. Co. v. Gould, 80 Ill. 388.
Hastings v. Westchester Fire Ins. Co., 73 N. Y. 141.

Where there has been an adjustment of the loss, and a promise to pay the amount as adjusted, interest commences to run from the time the promise is made.
Home Ins. Co. v. Meyer, 93 Ill. 271.

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This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by and expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property, and the extent of the application of the insurance under this policy or of the contribution to be made by this company, in case of loss, may be provided for by agreement or condition written hereon or attached or appended hereto. Liability for reinsurance shall be as specifically agreed hereon.

The rules announced by the courts for the apportionment of a loss among several insurers do not always agree with the rules adopted by the adjusters. The courts generally hold that the insured must be fully indemnified for any loss he may sustain, and that the insurance will be apportioned in a manner to give him the greatest indemnity.

Where all the policies are absolutely alike covering all the property of the insured, little question can arise, once the amount of the loss is ascertained, as to the proper apportionment of the loss to the several insurers. It is only in cases of specific and blanket insurance that difficulty arises.

The right to contribution between companies is based upon the concurrence of the policies, and it is a necessary incident of its existence that the several insurers shall be bound with equal certainty and in the same sense, for the same loss.

Baltimore Fire Ins. Co. v. Loney, 20 Md. 20.
Lowell Mfg. Co. v. Safe Guard Fire Ins. Co., 88 N. Y. 591.
Connecticut Fire Ins. Co. v. Merchants and Mechanics' Ins. Co. (Va.), 15 Ins. L. J. 615.
Royster v. Roanoke Ins. Co., 26 Fed. 492.
Clarke v. Western Assur. Co., 146 Pa. 561.

Concurrent insurance is that which, to any extent, insures the same interest, against the same casualty, at the same time as the primary insurance, on such terms that the insurance companies would bear proportionally the loss happening within the provisions of both policies. It is this last quality that distinguishes concurrent insurance from mere double insurance. The permission of concurrent insurance, in contrast with a requirement thereof, gives the insured an option as to the time when he will procure other insurance, the length of its duration and the property it shall cover, provided it shall proportionally aid the primary insurer in bearing whatever loss may occur within the range of their common operation.

New Jersey Rubber Co. v. Commercial Union Assur. Co., 13 Ins. Dig. 102; 46 Atl. Rep. 777.

In a policy permitting "concurrent insurance," the term includes policies running with that of the incident company, and sharing its risk; and includes those covering not only a part of the risk, but all of it, and more.

Washburn-Halligan Coffee Co. v. Merchants' Brick Mut. Fire Ins. Co., 13 Ins. Dig. 46; 81 N. W. Rep. 707.

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In Ogden v. East River Ins. Co., 50 N. Y. 388, where there was both specific and blanket insurance on the property, the court announced the rule as follows:

"If the entire property is destroyed, as in this case, the rule laid down in 2 Phillips on Insurance, p. 36, No. 1263a, and in Blake v. Exchange Mutual Ins. Co., 12 Gray 265, carries out the intent of the clause and works entire equity between the insurers and the insured, as well as between the several insurers. That rule is, in substance, that for the purpose of apportioning the loss, in case of overinsurance, where several parcels are insured together by one policy for an entire sum, and one of the parcels is insured separately by another policy, the sum insured by the first mentioned policy is to be distributed among the several parcels in the proportion which the sum insured by the policy bears to the total value of all the parcels. Thus, in round numbers, the sum insured in this case by the policies other than the defendant's on the property as an entirety was $47,000. The total value of the property covered by these policies was $88,000. In case of a total loss, each parcel should be deemed insured thereby for 47-88 of its value. The parcel separately insured by the defendant was worth $16,000, and was insured by the defendant for $3,000, which was equal to 3-16 of its value."

In the case of Meigs v. London Assur. Corp., 126 Fed. 781; 17 Ins. Dig. 32, the insurance was on the main building, consisting of several wings or attached buildings, and the contents. The court specifies these policies as "Class A." Afterwards an addition, called the east wing, was built, which, with its contents, was insured in companies specified by the court as "Class B." Class A covered the east wing, with the other parts of the building. Class B covered the east wing and contents only. The plaintiff's loss was adjusted at the following sums:

Loss on east wing building (the addition)	$26,668.50
Loss on contents in east wing (this includes a loss of $4,500 on student's clothes)	13,250.00
Loss on buildings other than east wing	1,815.65
Loss on contents in buildings other than east wing	2,332.30

The court apportioned the loss in the following manner:

Class A insured $130,000 on the main building; Class B does not cover this building at all, and therefore Class A must bear the whole loss, $1,815.65, leaving a balance of $128,184.35, which, with the $60,000 of Class B, must bear the loss on the east wing and must pay $19,527.94, while Class B pays $8,140.56, aggregating the amount of the adjustment, $28,668.50. The pupils' clothing in the east wing was insured by Class B alone, and the whole amount of this loss ($4,500) must therefore be borne by the specific policies, leaving $3,000 of Class B to share the loss on the other contents of the east wing. In like manner the contents of the main building were insured by Class A alone, and all of the losses thereon ($2,332.30) must be paid for by this class. Of the $50,000 insured by Class A upon the contents of the two buildings, $47,667.70 will therefore remain to share, with the $3,000 of Class B, the loss of $8,750 on the remaining contents of the east wing. Of this, Class A pays $8,231.93 and Class B pays $518.07.

In the case of Schmaelzle v. London and Lancashire Fire Ins. Co., 75 Conn. 397, the court announces the rule for apportion-

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ment as follows: The first requisite of any method of apportionment sought to be applied, must be the insured's protection to the full extent of his rights under his policies. Any method which, in a given case, fails to afford him the full measure of his just indemnity, must give place to another which will.

In the case of Page v. Sun Ins. Office, 74 Fed. 203; 33 L. R. A. 249, the insured owned lumber, which was piled in two separate blocks. The portions of the property on the easterly of these blocks was worth $16,700, and that on the westerly of these blocks, $42,300. The fire caused a loss of over $30,000 on that part of the property situated on the westerly block. The insured held $40,000 blanket insurance, covering the two blocks, and $10,000 specific insurance on the property situated on the westerly block. The court held that the entire $40,000 of blanket insurance was liable, with the specific insurance, to contribution to the loss. The court further announces the following rules: First, compound policies insuring the property described in such a policy, and other property, cover the property so described, to their full amount, in case of a loss upon the property described in the specific policy, and no loss on the other property described in the compound policies. Second, in such a case the company issuing the specific policy is liable for no greater proportion of the loss than that which the amount of such policy bears to the total amount of both the compound and specific policies covering the property it describes.

For other cases of apportionment, see:

Merrick v. Germania Fire Ins. Co., 54 Pa. 277.
Cromie v. Kentucky and Louisville Mut. Ins. Co., 15 B. Mon. 432.
Angelrodt v. Delaware Ins. Co., 31 Mo. 593.
Sherman v. Madison Mut. Ins. Co., 39 Wis. 104.
Royal Ins. Co. v. Roedel, 78 Pa. 19.
Barnes v. Hartford Ins. Co., 9 Fed. 813; 11 Ins. L. J. 110.

Also see Illinois Mut. Ins. Co. v. Hoffman, 132 Ill. 522.

If the insured, at the time of the loss, holds other policies of insurance as subsisting policies, and which policies are valid on their face, although void by reason of some breach of their conditions, then such other policies are to be taken into account in ascertaining the contribution of the valid policies to the amount of the loss.

London and Lancashire Ins. Co. v. Turnbull, 86 Ky. 230.
Saville v. Ætna Ins. Co., 8 Mont. 419; 3 L. R. A. 542.

Where any policy, in the hands of the insured, is absolutely void, then such policy is not to be taken into account in ascertaining the amount of contribution.

Parks v. Hartford Fire Ins. Co., 100 Mo. 373.
Phenix Ins. Co. v. Lamar, 106 Ind. 513.

Policies upon different interests, issued on the same property, are not subject to contribution.

Tuck v. Ins. Co., 56 N. H. 326.
Niagara Fire Ins. Co. v. Scammon, 144 Ill. 491.
Eddy v. London Assur. Corp., 143 N. Y. 311.

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Where there are several policies on the same risk, and the total loss exceeds the total insurance under all the policies, each company must pay the full amount named in its policy.

Lebanon Ins. Co. v. Kepler, 106 Pa. 28.
Pencil v. Home Ins. Co., 3 Wash. 485.

The companies are not entitled to have policies which have expired taken into account in determining the liability to the insured. The mere fact that the insured had such other policies in force at the time the existing policies were issued, imposes no obligation on him to keep them in force, for the purpose of apportionment of the loss.

Richmondville, Union Seminary v. Hamilton Mut. Ins. Co. (Mass.), 14 Gray 459.
Quarrier v. Peabody Ins. Co., 10 W. Va. 507.
Lattan v. Royal Ins. Co. (N. J.), 16 Vroom 453.

The question of what constitutes other insurance has been heretofore covered, and need not here be repeated.

In East Texas Fire Ins. Co. v. Coffee, 61 Tex. 281, the court held that where the insured is made to bear a certain part of the risk, that part should be deducted from the total loss, and that the balance affords the proper basis for the apportionment of the loss among contributing companies.

To the same effect is Chesbrough v. Home Ins. Co., 61 Mich. 333; 15 Ins. L. J. 515.

If this company shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, this company shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this company by the insured on receiving such payment.

Where the loss of insured property is occasioned by the wrongful act of a person, the insurance company, upon payment of the loss to the insured, is entitled to be subrogated to the rights of the insured against the person occasioning the loss. This question most often arises between the insurance company and railroad companies or other common carriers. If goods are lost in transit by a common carrier, by the negligence of the carrier, and the insurance company, that has insured the goods, pays the loss to the insured, the insurance company becomes entitled to recover the amount so paid, from the carrier. The principle upon which this right of subrogation rests is thus stated by the United States Supreme Court, in Hall et al. v. Nashville & Chattanooga R. R. Co., 13 Wall. 367:

"It is too well settled by authorities to admit of question that, as between a common carrier of goods and an underwriter upon them, the liability to the owner for their loss or destruction is primarily upon the carrier, while the liability of the insurer is only secondary. The contract of the carrier may not be first in order of time, but it is first and principal in ultimate liability. In respect to the ownership of the goods and the risk incident thereto, the owner and insurer are considered but one person, having together the beneficial right to the indem-

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nity due from the carrier for a breach of his contract, or for non-performance of his legal duty. Standing thus, as the insurer does, practically in the position of a surety, stipulating that the goods shall not be lost or injured in consequence of the perils insured against, whenever he has indemnified the owner for the loss he is entitled to all of the means of indemnity which the satisfied owner held against the party primarily liable. His right rests upon the familiar principles of equity. It is the doctrine of subrogation, dependent not at all upon the privity of contract, but worked out through the right of the creditor or owner."

Again this same court, in the case of Steamboat Potomac v. Cannon, 15 Otto 630, says:

"This right of the insurer is not contingent upon the loss having been total, or upon its having been followed by an abandonment, but rests upon the ground that his contract is in the nature of a contract of indemnity, and that he is therefore entitled, upon paying a sum for which others are primarily liable to the assured, to be proportionally subrogated to his right of action against them."

Other cases in the United States Supreme Court on the subject are:

Phenix Ins. Co. v. E. & W. Transp. Co., 117 U. S. 312.
Comegy v. Vasse, 1 Pet. 193.
Fretz v. Bull, 12 How. 466.
The Monticello v. Mollison, 17 How. 152.
Garrison v. Memphis Ins. Co., 19 How. 312.
Mobile & M. R. Co. v. Jurey, 111 U. S. 584.
Sun Mut. Ins. Co. v. Kountz Line, 122 U. S. 583.
Chicago, etc., R. R. Co. v. Pullman, etc., Co., 139 U. S. 79.

In Hart et al. v. The Western Railroad Corp., 13 Metcalf 99, the fire was communicated from the locomotive of a railroad corporation to a building, and from that building to another building on the opposite side of a street sixty feet wide. The insurance company brought suit, in the name of the insured, for the amount which it had paid for the loss. In passing on the right of the company to subrogation, the court says:

"Now, when the owner, who, prima facie, stands to the whole risk, and suffers the whole loss, has engaged another person to be at that particular risk for him in whole or in part, the owner and the insurer are, in respect to that ownership and the risk incident to it, in effect one person, having together the beneficial right to an indemnity provided by law for those who sustain a loss by that particular cause. If, therefore, the owner demands and receives payment of that very loss from the insurer, as he may by virtue of his contract, there is a manifest equity in transferring the right to indemnity, which he holds for the common benefit, to the assurer. It is one and the same loss, for which he has a claim of indemnity. and he can equitably receive but one satisfaction. So that if the assured first applies to the railroad company, and receives the damages provided, it diminishes his loss *pro tanto* by a deduction from and growing out of the legal provision attached to and intrinsic in the subject insured. The liability of the railroad company is, in legal effect, first and principal, and that of the insurer secondary, not in order of time, but in order of ultimate liability. The assured may first apply to whichever of these parties he pleases; to the railroad company by his right at law, or to the insurance company in virtue of his contract; but if he first applies to the railroad company, who pays him, he thereby diminishes his loss by the application of a sum arising out of the subject of insurance, to-wit, the building insured, and his claim is for the balance; and it follows as a necessary consequence that if he first applies to the insurer and receives his whole loss, he holds the claim against the railroad company

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in trust for the insurers. Where such an equity exists the party holding the legal right is conscientiously bound to make an assignment in equity to the person entitled to the benefit; and if he fails to do so, the *cestui que* trust may sue in the name of the trustee, and his equitable interest will be protected."

In Bright Hope Ry. Co. v. Rogers, 76 Va. 443; 11 Ins. L. J. 899, the court, after stating that the question of the right of the insurance company to subrogation to the rights of the insured against a wrongdoer, who has occasioned the loss, can no longer be considered an open one in this country, says:

"The doctrine, briefly stated, is: 'Where the property insured is destroyed by the negligence of a third person, so that the assured has a remedy against him therefor, the insurer, by the payment of the loss, becomes subrogated to the rights of the assured to the extent of the sum paid under the policy, and may bring an action in the name of the assured to recover the amount so paid.' * * * The insurer's equitable right of subrogation is based upon what he has actually paid, and not upon that which he might or ought to have paid; and, as against the wrongdoer, he is entitled to indemnity for the part so paid, whether it be the whole or part of the demand."

In Home Mut. Ins. Co. v. Oregon Ry. & Navigation Co., 20 Oregon 569; 20 Ins. L. J. 639, the court, in passing on this question, says:

"The right of the insurance company that has paid a loss to recover of the wrongdoer after payment of such loss rests upon the doctrine of subrogation in its application to insurance companies. 'Every day,' said Lord Mansfield, 'the insurer is put in the place of the insured.' Mason v. Stainsbury, 3 Doug. 63. Subrogation is purely an equitable result. It is the creation of equity, is not dependent on contract, and is enforced for the purpose of attaining the ends of justice. It grows out of the relation which the parties sustain to each other; the party subrogated acquires no other or greater rights than those of a party for whom he is subrogated. As the contract of insurance is one of indemnity when the loss occurs by the negligence or wrongful act of a third party, and the insurer pays the insured, he is entitled, upon equitable principles, to be subrogated to the rights of the insured against the wrongdoer. Hence the general rule, that when property which has been insured is lost or destroyed by the negligence or willful act of another an action accrues in favor of the insured; and if the insurer pays the loss he is subrogated to the rights of the insured as against the wrongdoer, with all his rights as well as his remedies."

For other cases on this subject, see:
The Sidney, 27 Fed. Rep. 119.
Louisville, etc., Ry. Co. v. Manchester Mills, 88 Tenn. 653.
Queen Ins. Co. v. Hudnut Co., 8 Ind. App. 22.
People's National Gas Co. v. Fidelity Title and Trust Co. to use of Ins. Co. of North America, 24 Atl. Rep. 339; 21 Ins. L. J. 751.

A company which has, on payment of the insurance, taken an assignment from the insured of his claim against the wrongdoer causing the fire, is not limited to the amount of insurance paid as a measure of damages, but may recover the whole claim.
Hustiford Farmers' Mut. Ins. Co. v. C., M. & St. P. Ry. Co., 66 Wis. 58; 15 Ins. L. J. 834.
Marine Ins. Co. v. St. L., I., M. & S. Ry. Co., 41 Fed. 643; 19 Ins. L. J. 379.

The action is personal and transitory; its gravamen, negli-

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gence; and hence is maintainable in another State than the one where the loss occurred.

Home Ins. Co. v. Penna. R. R., 11 Hun. 182.

But one court has denied this right of subrogation to the companies—Carroll v. N. O., etc., Ry. Co., 26 La. Ann. 447—and in that case two of the justices dissented. It was there held that the insurance company had no right of subrogation against the railroad company, where goods were insured and destroyed by fire while in the hands of the railway company, for transportation, in the absence of formal stipulation in their policy giving them such right.

The fact that a foreign insurance company has not complied with the laws of the State, and has no right to do business within the State, does not affect its right to subrogation to the claim of the owner against a wrongdoer, and such company may maintain its action against the wrongdoer without showing compliance with the statutes.

Phenix Ins. Co. v. Pennsylvania Co., 134 Ind. 215; 20 L. R. A. 405.

Before the insurance company is entitled to subrogation, the owner must be fully indemnified for the loss of his property and for all expenses which he has incurred in enforcing his claim for such loss. If the loss to the property is occasioned by a wrongdoer, and the insurance is less than the loss so occasioned, the insurance company would not be entitled to subrogation until the insured had been fully indemnified.

In Newcomb et al. v. Cincinnati Ins. Co., 22 Ohio St. 382, the court, after recognizing the doctrine of subrogation, says:

"In case of partial insurance, of which class is the one at bar, the assured and underwriters have each a substantive interest in the claim against the wrongdoer, whereas in a case of full insurance and compensation the interest of the former is but normal. Where the assured, as in case of partial insurance, sustains a loss in excess of the reimbursement or compensation by the underwriter, he has an undoubted right to have it satisfied by action against the wrongdoer; but if by such action there comes into his hands any sum for which, in equity and good conscience, he ought to account to the underwriter, reimbursement will to that extent be compelled in an action by the latter based on his right in equity to subrogation. But the assured will not, in the forum of conscience, be required to account for more than the surplus which may remain in his hands after satisfying his own loss in full, and his reasonable expenses incurred in its recovery, unless the underwriter shall, on notice and opportunity given, have contributed to and made common cause with him in the prosecution.

"In this case, the losses of the plaintiff in error, in excess of insurance, exceeded $9,000; their recovery was $11,086. The costs of prosecuting the action exceeded $6,000. The amount applicable to their excess of loss, after payment of expenses, was insufficient to satisfy it. It is not unconscionable that they retain this; it would be to award any part of it to the defendant in error, who refused to hazard the costs of its recovery."

Also see:

Pentz v. Ætna Fire Ins. Co., 9 Paige 568.
Kernochen v. New York Bowery Ins. Co., 17 N. Y. 436.
National Fire Ins. Co. v. McLaren, 12 Ont. Rep. 682.
Home Mutual Ins. Co. v. Oregon R. Co., 20 Oregon 569.

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Right of Insured to Release Wrongdoer.

The standard fire insurance policy provides that: "If this company shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, this company shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this company by the insured on receiving such payment."

Where the insurance company has paid the loss to the insured, the company has the right to demand of the insured an assignment of his claim against the wrongdoer occasioning the loss, and the insured can not defeat this right of the company by a release of the wrongdoer after the loss.

In Hart et al. v. R. R. Corp., 13 Metc. 99, the insured property was destroyed by fire communicated from an engine of the railroad company. The insurance company requested plaintiffs to commence a suit against the railroad company to compel payment of the loss, and offered to indemnify the insured from costs and to save them harmless in reference to said suit. The insured refused to commence a suit as requested, but demanded the amount of their loss of the insurance company, who paid the same, first notifying the railroad company that they did not intend thereby to relinquish any claim which they might have against it for the amount. The insurance company, in the name of the insured, then brought suit against the railroad company to recover the amount paid. After the action was commenced, and before the entry of the writ, the insured executed an instrument declaring that they had received payment of their loss from the insurance company; that they had no claim against the railroad company; that they had not authorized the commencement of the action against it, and did not wish to have it prosecuted, and fully releasing any claim which they might have against the railroad on account of said loss. This release was pleaded by the railroad as a defense to the action. In overruling this defense the court says:

"That by accepting payment of the insurers the insured do implicitly assign their right of indemnity from a party liable to the assured. It is in the nature of an equitable assignment, which authorizes the assignee to sue in the name of the assignor for his own benefit; and this is a right which a court of law will support, and will restrain and prohibit the assignor from defeating it by a release. The formal discharge, therefore, given by the nominal plaintiffs, is not a bar to the action."

The Supreme Court of Wisconsin, in Swarthout et al. v. C. & N. W. R. R. Co., 48 Wis. 625, 9 Ins. L. J. 603, says:

"And the courts have likewise been very firm in supporting the right of the insurance company to bring an action in the name of the assured, and will not allow the latter to defeat such action, even by a release or discharge of the person by whose act the damage was occasioned. (Citing Hart et al. v. Western R. Co., 13 Metc. 99; Monmouth Co. Fire Ins. Co. v. Hutchinson et al., 21 N. J. Eq. 107; Conn. Fire Ins. Co. v. Erie Ry. Co., 73 N. Y. 399.)"

In the case of Conn. Fire Ins. Co. v. Erie Ry. Co., 73 N. Y.

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399, where the insured property was destroyed by the negligence of the railroad company, the insured received from the railroad company, for his damages, $1,800, and executed a release with the following proviso: "This settlement is not intended to discharge the C. Fire Ins. Co. from any claim which said M. has against them for insurance, but as a full settlement with and discharge of the E. Ry. Company only." Subsequently the insured brought an action upon the insurance policy and recovered judgment. After its payment he assigned any claim against the railway company which he had. In an action by the insurance company against the railway company to recover the amount paid, the court held that the clause quoted from the release limited the effect of it to a release of the balance, retaining the claim against the insurance company and excepting its right to a remedy over, and it did not affect its right to be subrogated.

A release executed in such terms has been held inoperative to exempt the wrongdoer from liability in:

Ins. Co. of North America v. Fidelity Title and Trust Co., 123 Pa. St. 523.

Fidelity Title, etc., Co. v. People's Natural Gas Co., 150 Pa. St. 8.

Monmouth County Mut. Fire Ins. Co. v. Hutchinson, 21 N. J. Eq. 107.

Tyler v. Ætna Fire Ins. Co., 16 Wend. 397.

Gracie v. New York Ins. Co., 8 Johns. 245.

Timan v. Leland, 6 Hill 237.

Bright Hope Ry. Co. v. Rogers, 76 Va. 443, 11 Ins. L. J. 899.

In this last case the court, after stating the right of subrogation, says:

"In such cases the assured stands in the relation of trustee to the insurer to the extent of the sum paid, and he can not even release the right of action, nor the action itself, if one has been commenced, so as to defeat the claim of an insurer to reimbursement from the wrongdoer for the injury."

A release executed by the insured to a wrongdoer, before receiving payment for his loss from the insurance company, or before demand for payment of the insurance company, would have the effect to release the wrongdoer from liability to the insurance company, where there was no saving clause in the release, as in the cases cited *supra*. The execution of such release by the insured, however, has the effect to discharge the insurance company from all liability under its policy.

In Dilling v. Draemel, 16 Daly 104, 9 N. Y. Supp. 497, the insured settled with the wrongdoer for his loss, and executed and delivered to him a general release, under seal, against all claims, dues and demands whatsoever. Thereafter he brought an action against the insurance company to recover that proportion of his loss over the amount received from the wrongdoer. The court says:

"Such a release destroyed the right of subrogation. If the assured, by his own act, absolutely and without reservation, releases the wrongdoer, he thereby discharges the insurer to the full extent to which he has defeated the insurer's remedy over by right of subrogation. High-

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lands v. Cumberland Valley Farmers' Mut. Ins. Co. (Pa.), 52 Atl. 130; Packham v. German Fire Ins. Co. (Md.), 46 Atl. 1066."

Where, however, the release is executed prior to the taking out of the insurance, the company is not entitled to subrogation, and such release does not operate to discharge it from liability. Thus, in Pelzer Mfg. Co. v. St. Paul F. and M. Ins. Co. et al., 41 Fed. 271, 19 Ins. L. J. 372, the insured property, a warehouse, was situated upon ground leased from the railroad company. By the terms of the lease, the railroad company was released from liability for damages from fire caused by its locomotives. The court held that the failure to mention this release did not operate to discharge the insurance company. Also see:

Pelzer Mfg. Co. v. Sun Fire Office et al. (S. C.), 15 S. E. Rep. 562.

Nearly all carriers now stipulate in their bills of lading that if there shall be any legal liability incurred by the carrier for loss or damage of goods, "the carrier so liable shall have the full benefit of any insurance that may have been effected upon, or on account of, said goods."

In the case of Phenix Ins. Co. of Brooklyn v. Erie & Western Transp. Co., 117 U. S. 312, goods were shipped on board a propeller of the company, and the same day were insured in the insurance company. The transportation company issued to the shipper a bill of lading containing the above provision. There was a loss, which the insurance company paid, and brought suit against the transportation company, claiming right of subrogation. The transportation company pleaded the provision in the bill of lading giving it the benefit of the insurance. In holding that the insurance company had no right against the transportation company, the court says:

"As the carrier might lawfully himself obtain insurance against the loss of the goods by the usual perils, although occasioned by his own negligence, he may lawfully stipulate with the owner to be allowed the benefit of insurance voluntarily obtained by the latter. This stipulation does not in terms or in effect prevent the owner from being reimbursed the full value of the goods; but being valid as between the owner and the carrier, it does not prevent either the owner himself or the insurer, who can only sue in his right, from maintaining an action against the carrier upon any terms inconsistent with this stipulation. Nor does this conclusion impair any lawful rights of the insurer. His right of subrogation arising out of the contract of insurance and payment of the loss is only to such rights as the insured has, by law or contract, against third persons. The policy containing an express stipulation upon the subject, and there being no evidence of any fraudulent concealment or misrepresentation by the owner in obtaining the insurance, the existence of the stipulation between the owner and the carrier would have afforded no defense to an action on the policy. (Citing Tate v. Hyslop, 15 Q. B. D. 368; Jackson Co. v. Boylston Mut. Ins. Co., 139 Mass. 508.)"

Mr. Justice Bradley dissented from this opinion, saying:

"Such agreement would be *res inter alios acta*, and void as against the insurer. It would be a fraud upon him. The carrier would thereby protect himself against the consequences of his own negligence, and compel the insurer to indemnify him without paying any premium. The owner of the goods gives up no right himself against the carrier, but they two agree, behind the insurer's back, that he shall have no right of subrogation against the carrier, but that the carrier shall have such

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a right against him, thus changing the law by their private agreement. It seems to me that this is contrary both to law and justice."

While I agree with Justice Bradley as to the right in such cases, yet all the decisions are the other way and in favor of the majority opinion of the court.

Platt v. Richmond, Y. R. & C. R. R. Co., 108 N. Y. 358, 17 Ins. L. J. 624.
Providence-Washington Ins. Co. v. The Sidney, 23 Fed. 88, 14 Ins. L. J. 382.
British and F. Ins. Co. v. G. G. & S. F. R. R. Co., 63 Texas 475, 14 Ins. L. J. 776.
Hartford Fire Ins. Co. v. C., M. & St. P. Ry. Co. (U. S. S. C.), 20 S. C. 33.
Roos v. Philadelphia, W. & B. Ry. Co., 7 Pa. D. R. 405.

But as to whether this is good or bad law, the insurance companies may protect themselves against it by inserting in their policies a provision that the insurance shall not inure to the benefit of any carrier; so that if a shipper accepts a bill of lading, giving a carrier the benefit of any insurance which he may have or may obtain, and the policy of insurance obtained by the shipper contains the provision that the insurance shall not inure to the benefit of any carrier, neither the shipper nor the carrier has any right of action against the insurance company under the policy for loss of the goods by negligence of the carrier.

Carstairs et al. v. Mechanics and Traders' Ins. Co., 18 Fed. 473, 12 Ins. L. J. 810.
Fayerweather v. Phenix Ins. Co., 118 N. Y. 324, 21 Ins. L. J. 342.
Dundee Chemical Works v. New York Mut. Ins. Co., 67 N. Y. St. Rep. 333.
North America Ins. Co. v. Easton, 73 Texas 167.

In Missouri it has been held that if the insured refuses to assign the cause of action belonging to the insurance company by virtue of the subrogation clause in the policy, it is a defense to an action on the policy.

Dick v. Franklin Fire Ins. Co., 81 Mo. 103.

This case seems to be in conflict with the other cases, to the effect that the company must pay the loss to the insured as a condition precedent to its right to demand subrogation. See cases cited *supra*.

In the case of Highlands v. Cumberland Valley Farmers' Ins. Co. (Pa.), 52 Atl. 130, the insured sought to avoid the forfeiture incurred by his release, executed to the wrongdoer, by averring that such release had been procured by the fraud of the representative of the railroad company. The court held that the release executed by the insured voided the policy, and the fact that such release may have been procured by fraud would not change the rule.

In the case of North British and Mercantile Ins. Co. v. Central Vermont Railroad Co., 40 N. Y. Supp. 1113, the railroad com-

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pany brought suit to recover the amount of the insurance under the provisions of its bill of lading entitling it to any insurance the insured might procure. The court there held that the fact that the fire resulted from the negligence of the railroad company was no defense to the action on the policy.

The rules deducible from the above cases are: (1) That a release executed by the insured to a wrongdoer after the loss has occurred avoids the policy. (2) That a release executed by the insured prior to the happening of the loss will not avoid the policy. (3) That a provision in the bill of lading that the carrier shall have the benefit of any insurance carried by the shipper is valid. (4) That unless the insurance company inserts a provision in its policy that such provision in the bill of lading shall avoid the policy, the provision will not have that effect, and (5) that if an insurance company issues a policy on property situated on ground leased from a railroad, the insurance company will not be entitled to subrogation if the lease exempts the railroad company from liability for fires occasioned by its negligence. As many of the elevators of the country are situated on railroad ground, this last is of particular importance to companies insuring that class of property.

For an extended discussion of the subject of subrogation as applied to the law of insurance, I refer you to an article in 42 Weekly Law Bulletin 285.

No suit on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire.

The wording of the limitation to twelve months "next after the fire" is a change from the wording of the policies prior to the Standard Form. Prior to the adoption of the Standard Form of Policy, the clause usually read "within twelve months after the loss shall occur."

The limitation, in the absence of any statute to the contrary, has been held in nearly all the States as binding upon the insured.

Phœnix Ins. Co. v. Lebcher, 20 Ill. 450.
Hekla Ins. Co. v. Schroeder (Ill. App.) 9 Brad. 472.
Richter v. Ins. Co., 66 Ill. App. 606.
Spare v. Home Mut. Ins. Co., 19 Fed. 14.
Peoria Ins. Co. v. Whitehill, 24 Ill. 466.

In Indiana where there is a statute forbidding companies to limit suits to less than three years, the limitation clause in the Standard Form of Policy is held invalid.

Holland v. Taylor, 111 Ind. 121.
Ins. Co. of North America v. Brim, 111 Ind. 281.
Small v. Ins. Co., 51 Fed. 789.

In Massachusetts a limitation for less than two years is void.

Association v. Hale, 96 Ga. 802.

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The limitation clause is also void under the North Dakota Statute.

Johnson v. Ins. Co., 1 N. D. 167.

Also under the Texas Statute.

Insurance Co. v. Luckett, 12 Tex. Civ. App. 139.

In Nebraska this provision of the policy has been held absolutely void as against public policy.

Barnes v. McMurtry, 29 Neb. 173.
Ins. Co. v. Drennan, 77 N. W. 67.
Grand View B. Ass'n v. Northern Assur. Co., 102 N. W. 246.

The Minnesota Standard Form provides for a two years' limitation.

Other States have statutory provisions affecting the condition of the New York Standard Form in this particular, and where there are such statutes the provision of the policy must yield to the statute and is governed thereby. Under the provision of the policy prior to the adoption of the New York Standard Form, where the general provision was that suit must be brought within twelve months after "the loss occurred," some of the courts held that the limitation did not begin to run until after the expiration of the time within which the company had to pay the loss.

Friezen v. Allemannia F. Ins. Co., 30 Fed. 352.
Hay v. Star F. Ins. Co., 77 N. Y. 235.
Ellis v. Council Bluffs Ins. Co., 64 Ia. 507.
Chandler v. St. Paul Ins. Co., 21 Minn. 85.
Steen v. Niagara Ins. Co., 89 N. Y. 315.

Other courts held that the limitation began to run under this wording from the date of the fire.

Johnson et al. v. Humboldt Ins. Co., 91 Ill. 92.
Chambers v. Atlas Ins. Co., 5 Conn. 17.

The decisions of the courts as to the time when the limitation begins to run, under the wording of the New York Standard Form of Policy, are as conflicting as under the former wording of the policy. In the following cases it was held that the time did not begin to run from the date of the fire, but from the date when the payment became due under the policy.

Case v. Sun Ins. Co., 83 Cal. 473.
Read v. State Ins. Co., 103 Ia. 307.
Hong Sling v. Royal Ins. Co., 8 Utah 135.

Other States holding this same rule are Tennessee and Oregon.

In the following cases it was held that the limitation began to run from the date of the fire:

Travelers Ins. Co. v. California Ins. Co., 1 N. D. 151.
State Ins. Co. v. Meesman, 2 Wash. 459.
Steel v. Phœnix Ins. Co., 47 Fed. 863.
State Ins. Co. v. Stoffels, 48 Kans. 205.
Steel v. Phœnix Ins. Co. (154 U. S.) Book 38 L. Ed. 1064.

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In this last case, however, the Supreme Court of the United States was divided, five of the judges being in favor of the construction that the limitation began to run from the time the loss became payable and four of the judges being of the opinion that the time began to run from the date of the fire.

Other States in favor of this construction are Wisconsin, Kansas, Michigan, Georgia and Oregon.

In the case of Allemannia Fire Ins. Co. v. Peck, 133 Ill. 220, the court held that if the insured was induced to delay action, by the company holding out hopes of an amicable adjustment, the company will be estopped to claim that the rights of the insured under the policy have been lost by reason of delay in bringing the suit.

Other courts have made a similar ruling.

Austen v. Niagara F. Ins. Co., 45 N. Y. 106.

Where an action is commenced within the twelve months, but is dismissed for any cause, a new action brought after the twelve months has expired, will be too late, and can not be maintained, although there be a statute providing that in case the insured suffers a non-suit in any case, he may bring a new action at any time within a year after such non-suit.

Chichester v. New Hampshire F. Ins. Co. (Conn.) 51 Atl. 545.
Riddlesbarger v. Hartford F. Ins. Co. (U. S.) 7 Wallace 386.
Smith v. Herd et al. (Ky.) 60 S. W. 841.
Wilson v. Ætna Ins. Co., 27 Vt. 99.
McFarland v. Ætna Ins. Co., 6 W. Va. 437.
Lewis v. Metropolitan Life Ins. Co. (Mass.) 62 N. E. 369.

Other States announcing similar rules are Michigan and Kansas.

Where a suit at law is brought upon a policy within the twelve months, a bill in equity in aid of the suit at law praying reformation of the policy may be filed after the expiration of that period.

Woodberry Sav. Bank v. Charter Oak Ins. Co., 31 Conn. 518.

Where an action would be barred by reason of the twelve months, equity has no jurisdiction to reform the policy in a suit brought after the limitation has expired.

Thompson v. Phœnix Ins. Co., 25 Fed. 296.

In Arkansas it is held that, under the provision of the statute of the State, where the insured brings an action on the policy within twelve months and suffers a non-suit, he may commence another action on the policy at any time within a year after such non-suit, although such new action was commenced more than twelve months after the fire.

Lancashire Ins. Co. v. Stanley, 62 S. W. 66.

For a fuller treatment of the subject of limitation, I refer you to annotation in 35 U. S. Circuit Court of Appeals Report 404, and 47 Lawyer's Reports Annotated 696.

Lines 106 to 107.

Wherever in this policy the word "insured" occurs, it shall be held to include the legal representative of the insured, and wherever the word "loss" occurs, it shall be deemed the equivalent of "loss or damage."

The construction of these lines has been covered by previous lectures.

If this policy be made by a mutual or other company having special regulations lawfully applicable to its organization, membership, policies or contracts of insurance, such regulations shall apply to and form a part of this policy as the same may be written or printed upon, attached or appended hereto.

The effect of this provision is that no condition of the constitution, by-laws, rules or regulations of any mutual insurance company using the Standard Form of Policy, and which conflict with the provisions of such Standard Form, will be binding on the insured unless the same is printed or written upon, or attached or appended to, the policy.

Generally speaking, the contracts of mutual companies are governed by the same rules of construction as are the contracts of stock insurance companies.

This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be indorsed hereon or added hereto, and no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy, except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached.

No provision or condition of the policy has been oftener before the courts than has the above provision regarding waiver by agents, and it is to be regretted that the decisions in the different States, and even in the same State, are at such variance that it is difficult to determine just what rule is applicable in any State upon this subject.

The courts seem to divide the subject of waiver into three classes: (1) acts and conduct of the agent at the time of the issuance of the policy; (2) acts and conduct of the agent after the issuance of the policy and before the loss; and (3) acts and conduct of the agent after the loss.

The case mostly relied upon by the companies under the first division is Grand View Building Ass'n v. Northern Assur. Co., 183 U. S. 308. In that case it was shown that the agent had knowledge of the existence of other insurance at the time he delivered the policy and received the premium; and it was claimed

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that he waived the condition of the policy requiring consent to such other insurance to be indorsed on the policy.

In that case, after an exhaustive review of the authorities, the court says:

"The plaintiff's case, at its best, is based on the alleged fact that the agent had been informed, at the time he delivered the policy and received the premium, that there was other insurance. The only way to avoid the defense and escape from the operation of the condition is to hold that it is not competent for fire insurance companies to protect themselves by conditions of the kind contained in this policy. So to hold would, as we have seen, entirely subvert well-settled principles declared in the leading English and American cases, and particularly in those of this court."

The decision in this case, however, was by a divided court, five of the judges holding that there could be no waiver except in writing, and four of the judges holding that an oral waiver was binding on the company notwithstanding the condition of the policy.

This rule has been followed or announced in the cases of:

Anderson v. Manchester F. Assur. Co., 59 Minn., 182.
Bourgeois v. Northwestern Nat'l Ins. Co., 86 Wis., 606.
Germania Ins. Co. v. Bromwell, 62 Ark. 43.
Maupin v. Scottish Union and National Ins. Co. (W. Va.) 45 S. W. 1003.

The opinion of the United States Supreme Court in the above case (Grand View Building Ass'n v. Northern Assur. Co.) was expressly repudiated by the Nebraska Supreme Court, where there was a final decision of the case after its return from the United States Supreme Court. 102 N. W. 246.

In its opinion, the Supreme Court of Nebraska says:

"From the final decision in the former action, four out of the nine Judges of the United States Supreme Court dissented. The opinion of the majority, being an adherence to the letter of an antiquated and worn-out technical formality, seems to us to be an ironical commentary upon the often-repeated judicial boast that the law is a progressive science, and that the courts are continually adapting their processes and proceedings to changing social and business needs and customs. Either so, or else, as we consider, the court fell into a still more grievous error. The familiar maxim that equity regards that as having been done which was agreed to be and ought in good conscience to have been done has not for a long time been a stranger in courts of law in cases in which equitable matters are properly in issue. * * * The place where the contract was made, and where by its terms, it was to be performed, and where the subject of it was situated, is in Nebraska. We are at a loss to understand why the laws of Nebraska, as expounded by the highest court of the State, are not conclusive of its obligatory force, and of its meaning and effect, if not of the remedy appropriate to its enforcement."

Other cases in harmony with the rules of the Nebraska Supreme Court are:

Mfgrs. & Merchants Ins. Co. v. Armstrong, 145 Ill. 469.
Niagara F. Ins. Co. v. Johnson, 4 Kans. App. 16.
L. & L. & G. Ins. Co. v. Sheffy, 71 Miss. 919.
Berry v. American Cent. Ins. Co., 132 N. Y. 49.
Cross v. Nat'l F. Ins. Co., 132 N. Y. 133.
Wood v. American F. Ins. Co., 149 N. Y. 382.
Wagner v. Westchester F. Ins. Co., 92 Tex. 549.

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Stanhilber v. Mut. Mill Ins. Co., 76 Wis. 285.
Knarston v. Manhattan L. Ins. Co., 124 Cal. 74.
German Ins. Co. v. Yeagley (Ind.) 34 Ins. L. J. 22.
Welch v. Fire Ass'n (Wis.) 98 Wis. 327.
Hartley v. Penn Fire Ins. Co. (Minn.) 98 N. W. 198.
Virginia F. & M. Ins. Co. v. Richmond Mica Co. (Va.) 46 S. E. 463.
Medley v. German Alliance Ins. Co. (W. Va.) 47 S. W. 101.

After the issuance of the policy the weight of the decisions seems to be in favor of the rule that an agent can not bind the company by an oral waiver of the conditions of the policy, but that the waiver, to be effectual, must be indorsed or appended to the policy.

The leading case in favor of this rule is Quinlan v. Providence-Washington Ins. Co., 133 N. Y. 356.

In that case it was claimed that the agent had waived the provision of the policy forbidding foreclosure proceedings:

The court says:

"The limitations upon the authority of Kelsey were written on the face of the policy. It declared that "no officer, agent or representative" of the company should have power to waive any provision or condition embraced in the printed and authorized policy, but power is given to agents to waive added provisions or conditions, provided such waiver is written upon or attached to the policy. Where a policy permits an agent to exercise a specified authority, but prescribes that the company shall not be bound unless the execution of the power shall be evidenced by a written indorsement on the policy, the condition is of the essence of the authority, and the consent or act of the agent not so indorsed is void."

Other cases in favor if this rule are:

Phœnix Ins. Co. v. Copeland, 90 Ala. 396.
Queen Ins. Co. v. Young, 86 Ala. 424.
American Ins. Co. v. Hampton, 54 Ark. 75.
Farnum v. Phœnix Ins. Co., 82 Cal. 246.
Cleaver v. Traders' Ins. Co., 71 Mich. 414.
Gould v. Dwelling House Ins. Co., 90 Mich. 302.
Egan v. Westchester Ins. Co., 28 Ore. 289.
Westchester F. Ins. Co. v. Wagner, 10 Tex. Civ. App. 398.
Hankins v. Rockford Ins. Co., 70 Wis. 1.
Murphy v. Royal Ins. Co., 52 La. Ann., 775.
Alabama State Mut. Assur. Co. v. Long Clothing Co. (Ala.) 26 S. 655.

Directly opposed to the above rule is the case of Springfield Steam Laundry Co. et al. v. Traders' Ins. Co., 151 Mo. 90.

In that case it was claimed that the agent of the company had orally consented to foreclosure proceedings. In that case the court says.

"It is now well settled in this State that a general agent of an insurance company may waive proofs of loss, as well as forfeitures of policies obtained by means of false representations as to the condition of the property insured, or for the non-payment of premiums, notwithstanding it is expressly provided in the policy that only certain persons can waive such things (Nickell v. Ins. Co., 144 Mo., 420, and authorities cited); and we can see no reason why the same rule should

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not apply in case of forfeiture of the policy for any other violation of its provisions."

For other cases in accord with the rule announced by the Missouri court, see:

Mattingly v. Springfield F. & M. Ins. Co. (Ky.) 83 S. W. 577.
Manchester et al. v. Guardian Assur. Co., 151 N. Y. 88.
Northam v. International Ins. Co., 61 N. Y. Supp. 45.
Niagara F Ins. Co. v. Brown, 123 Ill. 356.
Concordia F. Ins. Co. v. Johnson, 4 Kans. App. 7.
Grubbs v. North Carolina Home Ins. Co., 108 N. C. 472.
Horton v. Home Ins. Co., 122 N. C. 498.
Springfield Steam Laundry Co. v. Traders' Ins. Co., 151 Mo. 90.
Ætna Ins. Co. v. Eastman (Tex.) 80 S. W. 255.
German-American Ins. Co. v. Yellow Poplar Lumber Co. (Ky.) 84 S. W. 55.

In this last case the Court of Appeals of Kentucky expressly refuses to be bound by the decision of the United States Supreme Court in the case of Grand View B. Ass'n v. Northern Assur. Co. It says:

"Deference and great respect is always due this exalted tribunal, but in this case it should be borne in mind that the Supreme Court was not construing a provision of the Constitution of the United States, an act of Congress, a treaty, or giving an exposition of law upon which its judgment would be final and conclusive here and elsewhere. The court was dealing with a question of general jurisdiction, upon which it was privileged, as this court is privileged, to exercise an independent judgment. It is no new thing for this court and the honorable Supreme Court to be in disagreement upon questions of general law. To review the long line of authorities in Kentucky, and bring them in accord with the conclusion reached by the Supreme Court of the United States in the case quoted above, would be to confess previous inability of this court to make and declare the law governing the rights and responsibilities of insurance companies and their patrons in this State. This would amount to an abdication of duty by the supreme judicial power of this State.

The general rule is that after a loss has occurred, the agent has power to waive the conditions subsequent named in the policy, such as giving of notice, making of proofs of loss, furnishing duplicate invoices, etc.

The Supreme Court of Illinois in the case of Fireman's Fund Ins. Co. v. Western Refrigerating Co., 162 Ill. 322, announced the following rule as to waiver after loss:

The company requested an instruction to the effect that under the provisions and conditions of the policy the agent had no authority to waive the condition relating to the limitation of action.

"This contention is based upon a stipulation in the open policy to the effect that only the manager of the company at Chicago had authority to waive, modify, or strike from the policy any of its printed conditions. That stipulation has been held to have reference only to the conditions entering into and forming the contract of insurance, and to have no reference to provisions as to what is to be done by the parties after a loss had been incurred. Ins. Co. v. Dowdall, 159 Ill., 179; 42 N. E., 606; Franklin F. Ins. Co. v. Chicago Ice Co., 36 Md., 102; Rokes v. Ins. Co., 51 Md., 512; Ins. Co. v. Matthews, 65 Miss., 310; 4 South., 62;

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Blake v. Ins. Co., 12 Gray, 265. Rumsey, Bliss & Co. held the open policy and issued the certificate. Mr. Bliss negotiated as agent of the company and the transactions were such that his representations, by which plaintiff was deterred from bringing suit within the limit, must be regarded as binding upon the company, and not affected by the limitation of power, to waive, modify, or strike from the poilcy any of its conditions."

Other cases in harmony with the rule announced by the Illinois Supreme Court are:

Franklin F. Ins. Co. v. Chicago Ins. Co., 36 Md. 102.
Hartford Ins. Co. v. Webster, 69 Ill. 392.
Carson v. Jersey City Ins. Co., 14 Vroom 300.
New Orleans Ins. Ass'n v. Matthews, 65 Miss. 301.
Farnum x. Phœnix Ins. Co., 82 Cal. 246.
Loeb v. American Cent. Ins. Co., 99 Mo. 50.
Brown v. State Ins. Co., 74 Ia. 428.
Dibbrell v. Georgia Home Ins. Co., 110 N. C. 193.
Harrison v. German-American Ins. Co., 67 Fed. 577.
Planters Mut. Ins. Co. v. Loyd, 67 Ark. 584.

The Wisconsin Supreme Court has denied the authority of the agent to waive any condition of the policy after the loss.

Oshkosh Match Works v. Manchester Assur. Co., 92 Wis. 510.

The decision in this case proceeds upon the theory that the Standard Form of Policy of that State is a statutory provision and therefore no part of its terms can be waived.

I can not more fully discuss the question as to what will amount to a waiver. I can only state the general proposition that if the agent or the company, having knowledge of any fact which would avoid the policy, recognizes the policy as a continuing contract, either by the acceptance of the premium, failure to cancel the policy, or by requiring the insured to do or perform some act under the terms and conditions of the policy, the forfeiture will be considered as waived.

This policy shall not be valid unless countersigned by the duly authorized agents of the company at ————————

In order to make the policy a binding and legal obligation against the company it is necessary that the same be countersigned by the agent, and a suit can not be maintained on the policy if not so countersigned.

Hardie v. St. Louis Mut. Life Ins. Co., 26 La. Ann. 242.
Badger v. American Poplar Life Ins. Co., 103 Mass. 244.
Peoria F. & M. Ins. Co. v. Walser, 22 Ind. 73.

While the insured who holds a policy which has not been countersigned by the agent can not sue upon the policy, he may treat the policy as evidencing an oral contract to insure, and may bring suit upon such oral contract and recover. Or the insured may allege facts estopping the company to deny that the policy was delivered as a completed contract without the countersignature of the agent.

German Fire Ins. Co. v. Laggart, 47 Kans. 663.

Closing lines.

TABLE OF CASES.